

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

—
No. 8657
—

—
LYLE E. REILLY, ET AL., *Appellants*

v.

HARRY A. MILLIS, ET AL., *Appellees.*
—

**Appeal from the District Court of the United States for the
District of Columbia.**
—

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8657

LYLE E. REILLY, GEORGE A. FREIBERT, FRED J. BAUER,
ARTHUR H. MEYER, EMIL DUNGER, THOMAS J. GEARY,
FINGAL GUSTAFSON, HUGHES F. MEIGHEN, HARRY J.
SCHULTE, JERRELL D. BROWN, ALFRED WILLIAM SEHLKE,
FRANK ROSS, JOSEPH HAVEL, ERNEST E. JOHNSON,
FRANK A. BARR, JAMES DINLEY, W. H. KRAUSE,
CLARENCE A. CORNELIUS, NORMAN D. RENN, JOHN J.
BOMICINA, *Appellants*,

v.

HARRY A. MILLIS, individually and as Chairman of the
National Labor Relations Board,
GERARD D. REILLY, individually and as a member of the
National Labor Relations Board,
JOHN M. HOUSTON, individually and as a member of
National Labor Relations Board, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANTS.

JURISDICTION.

Appellants, all citizens of the state of Illinois, instituted this suit against the appellees, constituting the members of the National Labor Relations Board, who are all residents and citizens of the United States and the District of

Columbia, to have declared null and void and expunged from the records of said Board a certain decision and direction of election and a certain supplemental decision and certification of representatives for collective bargaining purposes, upon the grounds that the same are beyond the constitutional powers of the Board to make and enter, are arbitrary and capricious and wholly unsupported by and contrary to the evidence before the Board, and would, if permitted to stand on the records of the Board, operate to deprive the appellants of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and their right to select representatives for the purpose of collective bargaining with respect to said matters, which rights are property rights protected by the Constitution of the United States, and that appellants had no other remedy for the protection of their said rights (App. 1-13). A preliminary injunction was asked to protect said rights of the appellants prior to the ultimate determination of the case (App. 28-30).

Appellees filed a motion to dismiss (App. 36-37). The District Court denied the motion for a preliminary injunction and granted the motion to dismiss. (App. 41). From this final order appellants, within thirty days of the entry thereof, filed their notice of appeal to this court (App. 42).

STATEMENT OF CASE.

Appellants, plaintiffs in the court below, are 20 out of a total of approximately 35 protection force employees of the City National Bank and Trust Company of Chicago (hereinafter called the "Bank"). Appellees, defendants in the court below, are the members of the National Labor Relations Board. This suit was brought by appellants to have a certain decision and direction of election and supplemental decision and certification of bargaining representatives made by said Board declared null and void, to enjoin the defendants from permitting the same to remain on the

records of the Board and to require the defendants to vacate, set aside and expunge the same from the records of the Board.

The record in the case consists of the complaint filed by appellants (App. 1), a motion to dismiss the complaint, filed by appellees (App. 36), an answer of appellants to the motion to dismiss (App. 38), a motion of appellants for a preliminary injunction (App. 28), affidavits in support of said motion (App. 31, 36), and an order of the District Court denying appellants' motion for a preliminary injunction and granting appellees motion to dismiss the complaint (App. 41).

A brief summary of the allegations of the complaint will be sufficient to set forth the nature of the suit. The complaint alleges the following facts:

Plaintiffs, 20 in number, are employed by the Bank as a part of its protective force. The Bank is a national banking corporation, chartered under the National Banking Act, and engages in general banking activities (App. 3).

The City National Safe Deposit Company (hereinafter called "Safe Deposit Company") is an Illinois corporation engaged in the business of renting deposit space to the public, is a wholly owned subsidiary and paying tenant of the Bank, the premises it occupies being within the physical confines of the Bank building (App. 4).

The protective force of the Bank consists of 35 armed guards comprising three groups, namely, police guards, messenger guards and night watchmen. The duties of the police guards consist of guarding the premises and directing customers seeking information. The messenger guards, sometimes called deputies, are plain clothes men who accompany and protect messengers traveling from the Bank to other banks or business houses in the City of Chicago. The night watchmen protect the premises of the Bank at night, turn off lights and watch for fires. All the protection force is under the immediate supervision of the chief of the day police of the Bank (App. 4).

The Safe Deposit Company employs three armed guards and five vault attendants, deputized to carry arms. Their duties consists of guarding the premises of the Safe Deposit Company, issuing, receiving and checking access slips from safe deposit box lessees and withdrawing and replacing boxes for lessees. They are under immediate supervision of the manager of the Safe Deposit Company (App. 5).

On March 26, 1943 Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.) a labor organization (hereinafter called the "Union") filed with the Regional Director of the Board for the Thirteenth Region (Chicago, Illinois) a petition alleging that a question affecting commerce had arisen concerning representation of certain of the employees of the Bank and of the Safe Deposit Company and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act (herein called the "Act"). This petition related to said approximately 35 protection employees of the Bank and said eight armed guards and vault attendants of the Safe Deposit Company and described them as together constituting an appropriate bargaining unit (App. 5).

After a hearing at which the Bank and Safe Deposit Company offered evidence in opposition to the petition, the Board made a decision and direction of election in which it found that the Bank and Safe Deposit Company might be considered as a single integrated enterprise, that they were engaged in commerce, that their operations affected commerce within the meaning of the National Labor Relations Act, and that said protective force of the Bank and said armed guards and vault attendants of the Safe Deposit Company constituted a proper bargaining unit. The decision and direction ordered that an election be held among said employees of the two companies to ascertain their representative for the purpose of collective bargaining (App. 6-7).

On July 10, 1943 an election was held among said employees. The Regional Director of the Board therefore certified that 23 unchallenged ballots were cast in favor of, and 17 against, the Union. Objections were filed by the Bank and Safe Deposit Company to the conduct of the election, to the jurisdiction of the Board and to the appropriateness of the unit. Said objections were overruled and the Board, by a supplemental decision and certification of representatives, certified that the Union had been designated and selected by a majority of all the members of the protection force employed by the Bank and of the armed guards and vault attendants employed by the Safe Deposit Company as their exclusive representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment (App. 7-8).

Thirty-five of the Bank's protection force voted at said election, 15 in favor of, and 20 against, the Union. But for the inclusion in the unit of the 8 employees of the Safe Deposit Company a majority of the votes cast would have been against the Union. At the time of said election and at the present time, it is the desire of a majority of the protection employees of the Bank that they not be represented by the Union for the purpose of collective bargaining. None of the plaintiffs was a party to or had any notice of or opportunity to be heard in said proceedings before the Board (App. 9).

The complaint alleges that appellants severally have a right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment, which right is a property right of great value, and that plaintiffs have a right to select representatives for the purpose of collective bargaining, etc., and that said right is also a property right of great value (App. 9).

The complaint charges that the said decision and direction of election and supplemental decision and certification of representatives are beyond the power of the Board and

in contravention of the Act and the Fifth Amendment to the Constitution of the United States and are invalid, null and void in that neither the Bank nor the Safe Deposit Company is engaged in commerce or in any activity affecting commerce, but each is engaged in purely local and intrastate activity limited to the territory and confines of the City of Chicago and that no business of either corporation has any direct, immediate, close or substantial effect upon interstate commerce; that the protection force of the Bank is not engaged in commerce or in any activity affecting commerce, but is engaged solely in protecting the physical premises and contents thereof belonging to the Bank in Chicago and the customers and employees making use of and going to and from said premises; that no part of their activity extends beyond the confines of the City of Chicago or affects interstate commerce in any direct, immediate, close or substantial manner; that the armed guards and vault attendants of the Safe Deposit Company are not engaged in commerce or in activities affecting commerce, that their activity is confined to the premises of the Safe Deposit Company in Chicago and that they are engaged solely in protecting said premises and in making available to customers the deposit boxes maintained in the vault of the Safe Deposit Company in Chicago (App. 9-10).

The complaint further charges that said decision and direction of election and supplemental decision and certification of representatives are erroneous and invalid for the further reasons that the findings of the Board namely: (1) that the Bank and Safe Deposit Company may be considered as a single integrated enterprise and that they are engaged in commerce and their operations affect commerce within the meaning of the Act, (2) that a question affecting commerce has arisen concerning the representation of the employees within the meaning of the Act and (3), that all the members of the protective force of the Bank and the armed guards and vault attendants of the Safe Deposit Company constitute a unit for the purpose of collective

bargaining, are unsupported by evidence and contrary to the evidence (App. 11).

It is further charged that the decision of the Board that the employees of the Safe Deposit Company should be joined in a collective bargaining unit with the protection employees of the Bank was and is arbitrary and capricious (App. 11).

It is further charged that unless said decision and direction of election and said supplemental decision and certification of representatives are not declared null and void or vacated and set aside the appellants will be unlawfully deprived of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and of their right to select representatives for the purpose of collective bargaining with respect to said subjects; that the value of such rights cannot be measured by any certain pecuniary standard and that an action at law for damages resulting to appellants because of the unlawful taking and destruction of said rights would be inappropriate and wholly inadequate (App. 11).

It is also alleged that the Act contains no provision by which the appellants may obtain a review of said decision and direction of election or said supplemental decision and certification of representatives and that appellants have no way of preventing the aforesaid unlawful taking of their property rights or of obtaining redress therefor except in a court of equity.

Said decision and direction of election and said supplemental decision and certification of representatives are attached as Exhibits to the Complaint (App. 12-28), which prays that they be declared null and void etc. (App. 12-13).

The only evidence in the case before the Court below consisted of an affidavit of *Lyle E. Reilly*, one of the appellants, and of *Robert E. Lynch*, one of the attorneys for appellants, filed in support of appellants' application for a preliminary injunction (App. 31-36).

The affidavit of *Reilly* states that the Bank declined to bargain with the Union; that the Union applied to the United States Conciliation Service to persuade the Bank to bargain with it; that if the Bank accedes to the Union's demand, the aforesaid property rights of appellants will be destroyed, and that if the Bank continues in its refusal to bargain with the Union, the dispute between the Union and the Bank will be certified to the National War Labor Board (App. 34). Said affidavit further states (App. 35):

"Affiant has been advised by his counsel and believes, and therefore states, that if the matter is presented to the National War Labor Board that body will, without examining into the validity of the certification by the National Labor Relations Board, order the Bank to recognize the Union and to bargain with it as the exclusive representative of all the protection employees of the Bank, provided the Supplemental Decision and Certification of the National Labor Relations Board are then still in effect. Affiant is further informed by his counsel and believes, and therefore states, that an order of the National War Labor Board is of such a coercive nature, both because of the support of public opinion which it has and because of the threat of application of sanctions by the President in the case of a violation, that the Bank will be compelled to and will obey it and bargain with the Union, in violation of property rights of affiant and the other plaintiffs to the above action."

The affidavit of *Robert E. Lynch* states that he has been advised that on September 14, 1943, the United States Conciliation service certified the dispute between the Bank and the Union to the War Labor Board (App. 36).

STATEMENT OF POINTS.**I.**

The Court below erred in dismissing the Complaint, because

1. The Board's decision and direction of election, and supplemental decision and certification of representatives are beyond the power of the Board and hence invalid, null and void, because

(a) The Safe Deposit Company is not engaged in interstate commerce or in any activity affecting interstate commerce, and

(b) Neither the employees of the Bank, nor of the Safe Deposit Company, involved in the Board's action, are engaged in interstate commerce or in any activity affecting interstate commerce.

2. The Complaint alleges that the findings of the Board on which the decision and direction of election, and the supplemental decision and certification of representatives rests are not supported by the evidence and are contrary to the undisputed evidence, which allegations are allegations of ultimate fact admitted by the appellees' motion to dismiss the complaint.

3. The findings of the Board that the Bank and the Safe Deposit Company, and their respective employees, involved in the Board's action, were engaged in commerce and in activities effecting commerce raise a constitutional question as to which appellants are entitled to a trial *de novo* in the courts.

4. The decision of the Board that the employees of the Bank and of the Safe Deposit Company involved in its decision, should be jointed in a collective bargaining unit is arbitrary and capricious.

5. Appellants' right to negotiate with their employer with respect to rates of pay, wages, hours of employment

and other conditions of employment, and the right to select representatives for such negotiations are property rights protected by the Constitution of the United States.

6. If said decisions and certification are permitted to stand, appellants will be deprived of their said property rights, because

(a) Appellants have no remedy under the National Labor Relations Act.

(b) The Bank has refused to bargain with the Union as the certified representative of the employees involved and, on the application of the Union, the dispute between the Bank and the Union has been certified to the National War Labor Board, whose policy is to order an employer to bargain with a certified union, without regard to the validity of the certification, until the same is set aside by a court of competent jurisdiction.

7. This court has jurisdiction,

(a) of the defendants, and

(b) of the subject matter.

II.

The court below erred in denying appellants' motion for a preliminary injunction.

SUMMARY OF ARGUMENT.

The Board was without jurisdiction to make the decision and direction of election or the certificate of representatives in question, because neither the Safe Deposit Company, nor its employees, nor the protective force of the Bank, are engaged in commerce or in activities having a close or substantial effect upon commerce. If the protective force of the Bank, or the Safe Deposit Company or its employees are not so engaged, the Board's action is void, because it grouped in one bargaining unit both the

protection force of the Bank and the guards and vault attendants of the Safe Deposit Company. The Board has no jurisdiction over any employee unless he is engaged in commerce or activities having a close or substantial effect upon commerce. A bargaining unit created by the Board which includes employees over which the Board has no jurisdiction is necessarily void.

The Bank's protective force is engaged in purely local policing activities within the limits of the City of Chicago, activities which the Bank could, and in case of emergency, no doubt would leave to the proper officials of the city of Chicago. It cannot be presumed that the city officials would fail so far in the performance of their duties as to oblige the Bank to cease performing its normal business functions for lack of police protection. It is always presumed that public officials will perform their duties until it is proven to the contrary. Thus it cannot be assumed that a labor dispute involving the protection force of the Bank could closely or substantially affect commerce. If such is the case the Board had no jurisdiction over the protection force of the Bank.

The Safe Deposit Company is engaged only in leasing safe deposit boxes to the public. Property deposited in such boxes is not moving in interstate commerce, but is deposited for safe keeping. So long as so deposited it is definitely out of commerce and cannot reenter any commerce until removed from the premises of the Safe Deposit Company. It is difficult to conceive of any activity more remote from effects upon interstate commerce than that of the Safe Deposit Company. It is essentially a local activity in every sense of the word.

If such an activity is to come within the regulatory power of Congress then there is really no activity of the slightest importance that does not come within that power. If such is the case then our Federal system for practical purposes ceases to exist, states become of no more real political importance than counties, mere empty shells of

their former sovereign selves, deprived of all vital powers by the national government.

The constitution provides that Congress shall have power to "regulate commerce with foreign nations and among the several states." The Supreme Court has already added to this clear and precise language of the Constitution the further words "and anything closely and substantially affecting such commerce." No doubt realizing the tremendous impact of its action on our federal system, the court has several times said that before an activity can come within the regulatory power of Congress as an activity affecting interstate commerce, the effect on interstate commerce must be close and substantial. *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 466; *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 30, 37. Whether the effect of any particular activity upon such commerce is sufficiently close and substantial to bring it within the regulatory power of Congress has been left for decision as the question may arise before the court.

We are aware of no decision of the Supreme Court holding that activities so remote in their possible effect upon interstate commerce as that of the employees here involved is within the regulatory power of Congress.

The appellants are entitled to a trial *de novo* in the court on the question of the Board's jurisdiction. Administrative bodies cannot be the final judge on the question of their own jurisdiction. That question is always reviewable in the courts, otherwise the courts would be deprived of their power, given by the Constitution, to decide all Constitutional questions. The question of jurisdiction usually, as in the instant case, depends upon the facts, and as stated by Chief Justice Hughes in *Crowell v. Benson*, 285 U. S. 22, 56, 60, frequently fundamental rights "depend upon the facts and finality as to facts becomes in effect finality in law," and "the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal

court should determine such an issue upon its own record and the facts elicited before it.”

The court below in dismissing the complaint stated in effect that the Board had sufficient evidence to support its action (App. 40) although the evidence before the Board was not before the court, and although the appellants were not and could not constitutionally be bound by the evidence before the Board since they are entitled to a trial *de novo* on the questions of fact involved in determining the Board's jurisdiction.

The complaint alleges that the decision and direction of election and the supplemental decision and certification of the representatives were erroneous and invalid because the findings of the Board on which they were based, namely, that the Bank and Safe Deposit Company are engaged in interstate commerce and activities affecting such commerce, and that the protection employees of the Bank and the guards and vault attendance of the Safe Deposit Company comprise an appropriate bargaining unit, were unsupported by, and contrary to, the evidence. For the purposes of the motion to dismiss these allegations are allegations of fact admitted by the motion, and the court necessarily erred in sustaining the motion. *Chicago Junction case*, 264 U. S. 258, 262.

The action of the Board in holding that the protection force employees of the Bank and the guards and vault attendants of the Safe Deposit Company constitute an appropriate bargaining unit was arbitrary and capricious as is demonstrated by the action of the Board in other analogous cases wherein it has held that employees of a parent company and its subsidiary may not be combined in one bargaining unit. It was only through the combining of said employees of the Bank and the Safe Deposit Company in one unit that the union was enabled to obtain a favorable vote of a majority of all the employees in the unit. The appellants, constituting a majority of the protection force employees of the Bank, were at the date of the election and

still are opposed to having the union as their bargaining representative.

The arbitrary and capricious action of the Board in grouping said employees of both companies in one unit as well as the unconstitutional action of that Board in assuming jurisdiction over such employees of both companies deprived the appellants of their property rights. For the rights of appellants to negotiate with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment, and their right to select representatives for such negotiations are property rights. Such rights are protected by the Constitution of the United States.

The appellants have no recourse for the protection of such rights other than to this court. After the union had been certified as the bargaining representative of said employees and the Bank had refused to bargain with it, the union did not avail itself of the remedies provided by the National Labor Relations Act, but took steps designed to use the National War Labor Board as the medium through which the Bank would be compelled to bargain with it. Manifestly this procedure was adopted for the purpose of depriving appellants of the opportunity, afforded by the National Labor Relations Act, to obtain a determination of the question of whether they had been deprived of rights guaranteed under the constitution, a question upon which they never had an opportunity to be heard, even before the National Labor Relations Board. The National War Labor Board has repeatedly held that it will not go behind the certification of a bargaining representative by the National Labor Relations Board but will order contracts between the employer and such certified representative. The result of this procedure will be that unless this court sets aside the certification of the National Labor Relations Board the appellants will be deprived of their constitutional rights because the Bank will be unable to resist the compulsion of an order of the National War Labor Board that it contract with the union.

Unless this court takes jurisdiction of, and determines, the questions raised by this suit the appellants will be deprived of rights under the constitution. Under such circumstances this court will not deny appellants their day in court but will take jurisdiction of the case and award the appellants a trial *de novo* on the constitutional question of whether the Board had power to make the decision and certification in question. *A. F. of L. v. National Labor Relations Board*, 70 Appeals D. C. 62, 103 F. (2d) 933.

ARGUMENT.

I.

The National Labor Relations Board's Decision and Direction of Election, and Supplemental Decision and Certification of Representatives Are Beyond the Power of the Board and Hence, Invalid, Null and Void.

Clause 3 of Section 8 of Article I of the Constitution of the United States provides that Congress shall have the power to "regulate commerce with foreign nations and among the several states." It is to this clause of the Constitution that the power of Congress to enact the National Labor Relations Act must be referred.

Section 9(c) of the Act (L. 372, 49 Stat. 449-457, 29 U. S. Code, Sec. 151-166) provides in part:

"Whenever a question *affecting commerce* arises concerning the representation of employees, the Board may investigate such controversy and certify to the Board, in writing, the name or names of the representatives that have been designated or selected."

Section 2 (6) of the Act provides:

"The term 'commerce' means trade, traffic, commerce, transportation or communication among the several states. * * *".

Section 2 (7) provides:

“the term ‘*affecting commerce*’ means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute, burdening or obstructing commerce or the free flow of commerce.”

Under the statute, before the Board has any purported authority to investigate a controversy concerning representation of employees and to certify the representative, the controversy must be one in interstate commerce, or must burden or obstruct interstate commerce, or its free flow, or must have led to or have a tendency to lead to a labor dispute burdening or obstructing interstate commerce or its free flow.

If in the instant case there was no such dispute, then clearly the Board had no jurisdiction in the premises.

(a) *The Protection Employees of the Bank are not Engaged in Interstate Commerce or in any Activity Directly and Substantially Affecting Interstate Commerce.*

As stated in the bill of complaint, the protection force of the Bank consists of 35 armed guards, who are divided into three groups, namely, police guards, messenger guards and night watchmen. The duties of the police guards consist of guarding the premises and directing customers seeking information. The messenger guards accompany and protect messengers traveling from the Bank to other banks, or business houses in the city of Chicago. The night watchmen protect the premises of the Bank at night, turn off lights and watch for fires (App. 4-5). Obviously, all of said protection force are engaged in local police activity in the City of Chicago, which is purely an intrastate activity. They are not engaged in commerce between the states, and their activity does not affect commerce between the states.

By not affect, is, of course, meant closely or substantially affect since it is almost impossible to conceive of any local

activity of any kind that might not have some remote effect upon interstate commerce.

This has been pointed out by the courts in a number of decisions. In *Lofther v. First National Bank of Chicago*, 48 Fed. Supp. 692, affirmed 138 F. (2d) 299, C. C. of A., (Seventh Circuit), it appeared that the bank conducted its banking operations in a building which it owned, a portion of which was rented to tenants, some of whom were engaged in interstate commerce. The court held that the elevator operators, janitors and watchmen employed by the bank in the operation of the building were not engaged in, or necessary to commerce, within the meaning of the Fair Labor Standards Act. The court said (p. 695):

“I do not believe that the activities of an elevator operator or a janitor are activities or occupations which are essential or necessary to the carrying on of the banking business, or to the sale by the tenants of steel, or stocks or bonds, or the writing of a brief in a lawyer's office. Even if, as plaintiff insists, the necessity is an economic one rather than a physical one, the fact remains that plaintiffs' activities are services which contribute only to comfort and speed in reaching various portions of the building, and not activities which are economically essential or necessary to carrying on the banking business or the business of the individual tenants. In the case of *Johnson v. Filstow, Inc.*, D. C., 43 F. Supp. 930, 932, the District Judge there, in disposing of a like question, said:

‘If the plaintiff's contentions be sustained on the theory that sweeping the office is necessary to interstate commerce, it should not stop with the janitor. A janitor must wear clothes; it is necessary that he be clothed before he could enter the office and sweep it. Therefore, the merchant who sold him the clothes would be supplying an essential to interstate commerce. Or, if the janitor had on a shirt that was made by his wife for his use in sweeping, the wife would also be engaged in the production of goods for commerce. It is necessary for the janitor to eat, and if by chance he bought a hamburger from a restaurant, the restaurateur would be furnishing an essential in interstate com-

merce. And so on, ad infinitum. Reductio ad absurdum!" "

To take the view that anything affecting interstate commerce, however remote that effect may be, is within the regulatory power of Congress is, as Mr. Justice Roberts said in *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88 (p. 94):

"To ignore all practical distinction between what is parochial and what is national. It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses."

The Supreme Court has said more than once that activities which are intrastate when separately considered must have a close and substantial relation to interstate commerce before they come within the scope of Federal regulative power.

Thus in *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, the majority of the Court, speaking through Mr. Justice Hughes, said (p. 466):

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation v. United States*, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' *Id.*, p. 554."

In *Labor Board v. Jones & Laughlin*, 301 U. S. 1, the majority of the Court, again speaking through Mr. Justice Hughes, said (page 30):

“The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce ‘among several States’ and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.”

And at page 37:

“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp. v. United States*, supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree.”

It is clearly manifest that unless the power of Congress to regulate activities in their nature purely intrastate is limited to such activities as have a close and substantial effect upon interstate commerce, our federal system of government will inevitably be destroyed and the minute details of our daily lives be regulated by a vast bureaucratic organization centered in the national capitol with little knowledge or care for local conditions and problems. It is not too much to say that the preservation of state sovereignty with something approaching its one time scope and prestige will be vital to the liberty of the individual.

When we consider that the protection force employees of the Bank are performing merely local police activities which the Bank might, and which some banks do, leave to the local municipal authorities, it becomes apparent that their activities can have no such a close and substantial effect upon interstate commerce as to bring them within the regulatory power of Congress.

Courts always presume that public officials will perform their duties. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 357; *Utah Power & Light Co. v. Pfort*, 286 U. S. 165, 190, 31 C. J. S. 798. Should the Bank dispense with its protection force, or for any reason be without its service, it must be assumed that the local police officials would perform their duties and afford the Bank whatever police protection might be necessary to enable it to perform its normal business functions. Hence there is no ground for the assumption that a labor dispute involving the Bank's protection force would in the remotest degree affect interstate commerce.

The Court below cites the case of *National Labor Relations Board v. Bank of America*, 130 Fed. 2d, 624 as authority for the statement that the Bank in the instant case is engaged in commerce, and apparently assumed that if the Bank is engaged in commerce, the jurisdiction of the Board in the instant case is established. If it be assumed that some of the Bank's activities constitute commerce, or directly and substantially affect commerce, such assumption does not dispose of the question of the Board's jurisdiction in the instant case. In the *Bank of America* case, the employees involved were the great bulk of the rank and file of the employees engaged in the commercial activities of the bank, and through whom such activities of the bank as the court found constituted commerce between the states, or directly and substantially affected that commerce, were performed. That case is in no way an authority in the instant case.

As previously noted, before the Board has any authority to investigate a controversy concerning representation, etc.,

the controversy must be one which burdens or obstructs or tends to burden and obstruct interstate commerce in a direct and substantial manner. The question is not whether the employer may or may not be engaged in interstate commerce in certain respects, but whether the particular controversy has or may have, a direct and substantial effect upon interstate commerce.

Thus in *National Labor Relations Board v. Santa Cruz Fruit Packing Co.*, 91 Fed. 2d, 790 (C. C. A. 9th Cir.) affirmed in *Santa Cruz Fruit Packing Co. v. Labor Board*, 303 U. S. 453, the Board had entered orders for the fruit company to cease and desist from certain violations of the National Labor Relations Act applicable to two packing plants of the company, one of which plants shipped large quantities of its products in interstate commerce, and one of which made no shipments in interstate commerce. The court held it would not enforce the order with respect to the plant making no shipments in interstate commerce. The effect on interstate commerce of the labor dispute at such plant was too remote to be subject to Congressional control.

The Board has itself recognized that the basis of its jurisdiction is not whether the employer may or may not be engaged in commerce. Thus in *Remington-Rand, Inc.*, 27 N. L. R. B. 488, the Board dismissed a petition for investigation and certification of representatives for lack of evidence to sustain its jurisdiction, although the company admitted it was engaged in interstate commerce. The petition related to approximately 30 employees in the New York City tabulating machine service division of the company, who were employed solely in servicing tabulating machines leased by the company in the State of New York.

To the same effect is *Wald Transfer & Storage Company, Inc.*, 3 N. L. R. B. 712, at 717.

(b) Neither the Safe Deposit Company Nor Its Employees Here Involved Are Engaged in Interstate Commerce or in Any Activity Directly or Substantially Affecting Such Commerce.

As alleged in the bill of complaint, the Safe Deposit Company is engaged in the business of renting safe deposit space to the public. Of a total of 15 Safe Deposit Company employees, 8 were involved in the proceedings before the Board, namely 3 armed guards and 5 vault attendants, whose duties consisted, respectively, of guarding the premises, and issuing, receiving and checking access slips from safe deposit lessees who required admission to the vaults, and withdrawing and replacing boxes for lessees (App. 4-5). The company and its employees are simply engaged in renting space where customers might deposit property for safekeeping. The company's relations to its customers is not even that of a warehouseman since it does not have immediate control of the property stored, but only of the receptacles in which the property is stored.

Certainly property stored in a receptacle in a vault for safekeeping is not property moving in commerce. Safe Deposit Company has no right or authority to ship any of the property so stored in interstate commerce.

In fact, it is difficult to conceive of any activity less directly related to or affecting interstate commerce than that engaged in by the Safe Deposit Company.

In *Wald Transfer & Storage Company, Inc., supra*, the Board held that the portion of a trucking company's business which represented the collecting and storing of furniture and household goods for local owners, and of automobiles, plumbing fixtures and miscellaneous commodities for dealers' accounts was intrastate and beyond the Board's jurisdiction, although that portion of the company's business which consisted in picking up and delivering freight at shipping points within the city as a part of its through movement of such freight, either into or out of the state, was interstate business and subject to the Board's jurisdiction.

The Safe Deposit Company does not either pick up or deliver goods to its vaults, or have control of them in its vaults. It simply rents space where customers may store their valuables for safekeeping and guards the receptacles wherein the goods are stored. If the local warehouse business of the Wald Company above referred to was intrastate in character, certainly the business of the Safe Deposit Company is wholly intrastate and can have only the most remote, if any, effect upon interstate commerce.

Certainly the Safe Deposit Company's business does not any more closely or directly affect interstate commerce than did the fruit packing business of the Santa Cruz Fruit Company, at the plant from which it shipped no goods in interstate commerce, and which the Circuit Court of Appeals in *National Labor Relations Board v. Santa Cruz Fruit Co.*, *supra*, held was beyond the jurisdiction of the Board. The fruit company packed and sold the fruit wholly within the State of California. Its vendees might have shipped the fruit in interstate commerce but the company did not. All of its activities were local. So are the activities of the Safe Deposit Company. Some lessees of the company might, perhaps, after removing their property from its receptacle in the custody of the Safe Deposit Company, ship it in interstate commerce, just as a man might take his household furniture out of a local storage warehouse and ship it in interstate commerce, or a vendee of the fruit company might ship some of the fruit in interstate commerce. But such is not sufficient to bring their activities within the jurisdiction of the Board.

If, as above demonstrated, neither the protection force employees of the Bank, nor the Safe Deposit Company nor the employees of the Safe Deposit Company are engaged in commerce, or any activity closely or substantially affecting commerce, then the Board was without jurisdiction and its decision and certification are null and void. This is equally true if it be assumed that the protection force employees are subject to the jurisdiction of the Board, but not the Safe Deposit Company or its employees, for the

Board, being without jurisdiction of the Safe Deposit Company employees had no lawful right to include them in a bargaining unit with the protection force employees and the unit found is a void and unlawful unit, and hence certification of the Union as the representative of such unit is null and void.

It should be noted that the Court below in its opinion stated that it felt the Board had supporting evidence to sustain its decision that the Bank was engaged in interstate commerce, within the meaning of the Act, but said nothing on the question as to whether the Safe Deposit Company was engaged in interstate commerce, a matter as vital to the jurisdiction of the Board to make the decision and certification attacked as the question of whether the Bank and its protection force employees are engaged in interstate commerce or activities affecting interstate commerce.

It should also be noted that the Court was evidently mistaken in saying that the Board had evidence to sustain its findings that the Bank was engaged in commerce. The record before the Board was not before the Court. All the Court had before it was the allegations of the Complaint. It could not know what evidence the Board had before it. Appellees' motion to dismiss, admitted the allegations of the Complaint and all the Court below had before it was the sufficiency of those allegations to state a cause of action.

We cite only a few of the many authorities sustaining this proposition. In *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.*, 123 Fed. 2d 518 (C. C. of A. 7th Circuit) the court in reversing the court below which had sustained a motion to dismiss the complaint said:

“It is well to remember that the motion to dismiss is the equivalent of a demurrer and that the court must accept as true all the allegation of the complaint and upon that basis determine whether the complaint presents a cause of action upon the Declaratory Judgment Act.”

To the same effect is *Federal Life Insurance Company v. Eltman*, 120 Fed. 2d, 827 (C. C. of A. 8th Circuit); also *Chicago Junction Case*, 264 U. S. 259, and Moore's Federal Practice, Volume 1, pocket supplement, page 603.

II.

Allegations of the Complaint that the Findings on Which the Decision and Certification of the Board Rest Are Not Supported by the Evidence and Are Contrary to the Evidence Are Allegations of Fact Admitted by Appellees' Motion to Dismiss.

The Complaint alleges that the findings of the Board that the Bank and Safe Deposit Company may be considered as a single, integrated enterprise and that both are engaged in commerce and that their operations affect commerce, that a question affecting commerce has arisen concerning representation of employees within the meaning of the National Labor Relations Act, and that the employees of the Bank and Safe Deposit Company here involved constitute a unit appropriate for collective bargaining, are each and all unsupported by the evidence and contrary to the evidence (App. 11).

This allegation of the Complaint is not a legal conclusion; it is an allegation of ultimate fact that must be considered as admitted by the motion to dismiss. Such was the direct holding of the Supreme Court of the United States in the *Chicago Junction Case*, 264 U. S. 258. That was a suit against the United States, the Interstate Commerce Commission, and certain railroads and their stockholders to have an order of the Interstate Commerce Commission declared void, and for other relief including an injunction. The case was heard in the district court on plaintiffs' motion for an interlocutory injunction and on defendants' motion to dismiss the complaint. The district court denied the injunction and dismissed the bill. On appeal, the Supreme Court reversed the district court, saying (p. 262):

"Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central 'will be in the public interest.' The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must **take that fact as admitted** for the purposes of this appeal. The allegation is made as one of fact."

In Vom Baur's Federal Administrative Law (1942) Vol. 2, it is said (page 703):

"That there was not substantial evidence to support an administrative finding must be taken as a fact from an appropriate allegation in a complaint upon a motion to dismiss directed to the face of the complaint."

The memorandum opinion of the Court below purports to be a decision on the merits of the controversy, to review the Board record and to find that there was evidence to support the Board's findings. However, as the Board's record was not before the court and the only question raised by the motion to dismiss was the sufficiency of the allegations of the complaint to state a cause of action, the court was bound to assume for the purposes of the motion, that, as alleged in the complaint, the Board's findings were wholly unsupported by the evidence. This being true, the Court manifestly erred in dismissing the complaint.

III.

The Finding of the Board that the Bank and the Safe Deposit Company, and Their Respective Employees, Involved in the Board's Action, Are Engaged in Interstate Commerce and in Activities Affecting Interstate Commerce, Involve a Constitutional Question as to Which the Appellants Are Entitled to a Trial De Novo.

The board found that the Bank and the Safe Deposit Company are engaged in interstate commerce and that their operations affected interstate commerce within the meaning of the National Labor Relations Act, and that a

question affecting interstate commerce had arisen concerning the representation of their employees (App. 11). The Court below stated in its opinion that "The Board had sufficient evidence to sustain its decision", and that the Bank is engaged in interstate commerce.

The question of whether said findings of the Board are correct is a Constitutional question on which the appellant's are entitled to a trial *de novo*.

The complaint alleges the facts concerning the activities of the Bank and of the Safe Deposit Company, and the duties of their respective employees here involved (App. 4-5). It further alleges that the Bank and Safe Deposit Company are engaged only in purely local and intrastate activity; that neither does any business beyond the geographical limits of the city of Chicago; that no business of either has any effect upon interstate commerce; that the protection force of the Bank and the armed guards and vault attendants of the Safe Deposit Company are engaged solely in local activity; and that no question concerning the representation of said employees did or could occur in interstate commerce, or burden or obstruct the same or the free flow thereof, or lead or tend to lead to a labor dispute burdening or obstructing the same or the free flow thereof. (App. 10-11)

These allegations of the complaint raise a question as to the constitutional power of the Board to entertain jurisdiction. As to such matters, neither the findings of the Board nor the evidence before the Board is controlling. The party challenging the power of the Board is entitled to a judicial trial of such an issue without regard to what occurred before the Board. The appellees are therefore entitled to introduce evidence before the Court which was not presented to the Board and they are in no way limited by the findings of the Board. This fundamental proposition of constitutional law is stated in Vom Baur's Federal Administrative Law (1942), Volume 1, page 256, as follows:

"Questions of constitutional right and power raised by administrative action are none the less appropriate

for the exercise of the judicial power, and must be tried de novo. Trial de novo has two outstanding characteristics, (1) the reviewing court must reach its own independent judgment on the facts and on the law, without being bound by the rule of administrative finality on the facts, and (2) additional evidence may be introduced, so that the case need not be decided on the administrative record alone.

"Courts must decide de novo * * * whether interstate commerce is involved, or affected to an illegal extent * * *."

The case of *Crowell v. Benson*, 285 U. S. 22, clearly and fully states the reasons for this fundamental principle of constitutional law. That suit was an action in the District Court to enjoin the enforcement of an award in favor of one Knudson and against one Benson, his alleged employer, made by a Deputy Commissioner of the U. S. Employees Compensation Commission under the Federal Longshoremen's and Harbor Workers' Compensation Act. The district court denied a motion to dismiss and granted a hearing de novo upon the facts and the law. An issue of fact as to the employment of Knudson by Benson was raised by answers filed. A trial was had and the court found that Knudson was not in Benson's employment and restrained the enforcement of the award. The decree was affirmed by the Circuit Court of Appeals and by the Supreme Court. The court, after pointing out that Congress might limit the scope of judicial review as to findings of fact by the Commission as to the extent of an employee's injuries, and other facts not involving the Commission's jurisdiction, speaking through Mr. Justice Hughes, said, page 54 et seq.:

"(3) What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist."

And at page 56, et seq.:

“In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.”

And again on page 60:

“In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved.”

And at page 63, et seq.:

“Assuming that the Federal court may determine for itself the existence of these fundamental or juris-

dictional facts, we come to the question,—Upon what record is the determination to be made? * * * As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. *We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.*" (Emphasis ours)

To the same effect are *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289 and *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 50.

It is manifest, as is pointed out by the Court, that any other rule would sap or destroy the judicial power of the courts in the enforcement of constitutional rights and lead to a government of bureaucratic character, alien to our constitutional system and destructive of our individual liberties as protected by the Constitution.

The Board's jurisdiction to enter the certification and decision was conditioned upon the Bank and the Safe Deposit Company and their respective employees being engaged in interstate commerce or in activities closely and directly affecting interstate commerce. If any of them are not so engaged, the Board's decision and certification are invalid and void because it had no constitutional power to make them.

It is respectfully submitted, not only that upon the admitted allegations of the Complaint, the court is required to assume that the Board's findings are not supported by

evidence, but also that with respect to the jurisdiction of the Board the Court is not concerned with the Board's findings or the record before the Board, but is under a duty to permit a *trial de novo* of that matter and to reach an independent judgment on the facts which may be presented at the trial.

IV.

The Decision of the Board that the Employees of the Bank and of the Safe Deposit Company Should Be Joind in a Collective Bargaining Unit Was Arbitrary and Capricious.

Even if it be assumed arguendo that the Bank, the Safe Deposit Company and their respective employees involved in the Board's decision are all engaged in interstate commerce or activities closely and substantially affecting interstate commerce, and that the Board had jurisdiction to enter its decision and certification, its decision that the employees of the two companies constituted an appropriate bargaining unit is arbitrary and capricious.

As shown by the allegations of the complaint, the Bank is a corporation organized under the National Banking Act, and the Safe Deposit Company is a corporation organized under the laws of the State of Illinois. The Bank owns all of the stock of the Safe Deposit Company but they are separate and distinct legal entities, performing separate functions. The Safe Deposit Company is a tenant and pays rent to the Bank for the premises it occupies. Only about one-half of the customers of the Safe Deposit Company are customers of the bank. Their respective incomes are derived from different sources. The manager of the Safe Deposit Company is not an officer of the Bank. The Bank's protection force employees are under the supervision of the chief of the day police of the Bank, while the employees of the Safe Deposit Company are under the supervision of the manager of the Safe Deposit Company (App. 405).

It is alleged in the complaint that the decision of the Board that said employees of the two companies comprise an appropriate bargaining unit was arbitrary and capricious, unsupported by the evidence and contrary to the evidence. As shown, *supra*, the allegation that the decision was unsupported by and contrary to the evidence must be taken as an allegation of fact admitted to be true by the motion to dismiss. Hence the court manifestly erred in allowing the motion to dismiss.

It is true the court below stated that the record disclosed that the Board had full and sufficient evidence to support its decision "that the bank and safe deposit company should be considered a single unit for the purposes of election", but in making the statement the court necessarily fell into error, because the court did not have before it any of the evidence before the Board. It did not and could not know what that evidence was.

That the decision was arbitrary and capricious is demonstrated by a number of the Board's own decisions.

Thus, in *Pennsylvania Salt Manufacturing Company*, 3 NLRB 741, where the property of the wholly owned subsidiary was on the premises of the parent company, and the parent obtained its power requirements from the subsidiary, for which it paid the subsidiary, but the subsidiary did business with others, the Board said (p. 745):

"In view of this evidence of the operation of Natrona Light and Power Company as a business entity separate from its parent, and especially in view of the sale of the major portion of its output to persons other than the Company, we find that the subsidiary is to be regarded as a separate employer from its parent. Therefore, we find that the employees of the subsidiary should not be included within the unit in the proceeding."

In *R. K. O. Radio Products Inc.*, 40 NLRB 1185, at 1190, the Board included in one unit certain types of employees employed by the parent company, but declined to include

in the unit similar types of employees of a wholly owned subsidiary company.

In *Haven-Busch Company*, 45 NLRB 1302, the Board said (p. 1304):

“Although the two enterprises are jointly owned, occupy adjoining property, and employees of Barkley occasionally perform common labor for “Haven-Busch, there was uncontradicted testimony that the two businesses are in all other respects separate—that the companies have different superintendents and wage scales, perform different operations for different sets of customers, meet different types of competition, and keep different sets of books and pay rolls. Under these circumstances we hold that the employees of each company constitute a unit appropriate for the purposes of collective bargaining.”

The court will consider prior actions of the Board in analogous cases in determining whether the Board has exceeded the limits of administrative discretion in the designation of a bargaining unit.

Thus in *National Labor Relations Board v. Mall Tool Co.*, 119 F. (2d) 700 (C. C. of A. 7th Circuit) the court said, page 702:

“Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board’s powers.”

(See also *National Labor Relations Board v. Delaware, New Jersey F. Co.*, 128 Fed. 2d, 130, 137, (C. C. A., 3rd Circuit.)

The mere fact that the Safe Deposit Company is a wholly owned subsidiary of the Bank does not justify the inclusion of the employees in a single unit. *Press Co., Inc. v. National Labor Relations Board*, 118 Fed., 2d, 937, at 946 (CT of App. D. C.). *Middle West Corporation*, 28 NLRB 540 at 546.

It was only by grouping the employees of the Bank and the Safe Deposit Company in one unit that the Union was able to obtain the vote of a majority of the employees in the unit. The result of this action on the part of the Board was to deprive appellants, constituting a majority of the protection employees of the Bank, of the right to bargain with the Bank with respect to the rates of pay, wages, hours of employment and other conditions of employment, and the right to select representatives for such bargaining. It is respectfully submitted that such action was arbitrary and capricious and should be set aside.

Furthermore, as above pointed out, the complaint alleged that the finding of the Board that the unit was appropriate was unsupported by, and contrary to, the evidence. As above demonstrated this was an allegation of ultimate fact, admitted by the motion to dismiss. Thus, in any event the court clearly erred in granting the motion.

V.

Appellants' Right to Negotiate with Their Employer With Respect to Rates of Pay, Wages, Hours of Employment and Other Conditions of Employment, and the Right to Select Representatives for Such Negotiations, Are Property Rights Protected by the Constitution of the United States.

This proposition is so fundamental and self-evident that it hardly needs citation of authority to support it. In *Coppage v. Kansas*, 236 U. S. 1, the court said (p. 14):

“The principle is fundamental and vital. Included in the right of personal liberty, and the right to personal property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-

established constitutional sense. The right is an essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, the court affirmed the decree of the court below enjoining the railroad company from interfering with the right of certain of its employees to organize and designate representatives for the purpose of bargaining with it as their employer. It was argued that Section 20 of the Clayton Act prohibited the injunction. On this point the Court said (p. 571):

"A subordinate point is raised by the petitioner under Section 20 of the Clayton Act. This section provides, in substance, that no injunction shall be granted in any case growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. This provision has been said to be declaratory of the existing law. *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 470. It may be doubted whether Section 20 can be regarded as limiting the authority of the court to restrain the violation of an explicit provision of an act of Congress, where an injunction would otherwise be the proper remedy. It is not necessary to pass upon this point, for if it could be said that it was necessary in the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the statutory requirement."

VI.

If Said Decision and Certification by the Board Are Permitted by this Court to Stand Appellants Will Be Deprived of Their Aforesaid Property Rights.

The complaint alleges that the National Labor Relations Act contains no provision by which appellants may obtain a review of said decision and direction of election or said supplemental decision and certification of representatives, and that appellants have no way of protecting the unlawful taking of their property right to bargain with their employer with respect to rates of pay, wages, hours of employment, and other conditions of employment, and of their right to select representatives for the purpose of collective bargaining with respect to said matters or of obtaining redress therefor save in a court of equity (App. 11-12).

This allegation is correct in every respect.

(a) Appellants are Afforded no Remedy Under the National Labor Relations Act.

While the National Labor Relations Act (Sec. 10 (f)) provides that any person aggrieved by a final order of the Board may obtain a review of such order in the United States Circuit Court of Appeals, it has been held by this court and the United States Supreme Court that a certification of a bargaining representative is not a final order of the Board reviewable under that Act (*A. F. of L. v. N. L. R. B.*, 70 App. D. C. 62, 103 Fed (2d) 933, 966, affirmed 308 U. S. 401).

It is only in the event that the Bank should refuse to bargain with the Union pursuant to said certification and the Union should institute proceedings under the Act to compel the Bank to negotiate and the Board should order such negotiations, that the appellants might be placed in a position to have the certification reviewed by the courts. But the Union has avoided such procedure, in a manifest attempt to deprive the appellants of an opportunity to a judicial review of the certification.

(b) *The Bank has Refused to Bargain with the Union as the Certified Representative of the Employees Involved and, on the Application of the Union, the Dispute Between the Bank and the Union has been Certified to the National War Labor Board, Whose Policy is to Order an Employer to Bargain with a Certified Union, without Regard to the Validity of the Certification, Until the Same is Set Aside by a Court of Competent Jurisdiction.*

In the affidavit of appellant, *Lyle E. Reilly*, filed in the court below (App. 31), it is stated that the Union has applied to the United States Conciliation Service to persuade the Bank to bargain with the Union, and that if the Bank continues in its refusal to bargain with the Union, the dispute between the Union and the Bank will be certified to the National War Labor Board. The affidavit of *Robert E. Lynch* states that the affiant is advised that the dispute has been so certified (App. 36).

The affidavit of *Reilly* further states that affiant has been advised by his counsel, believes and therefore states that if the matter is presented to the National War Labor Board, that body will, without examining into the validity of the certification, order the bank to recognize and bargain with the Union as the exclusive bargaining representative of the employees found by the National Labor Relations Board to comprise an appropriate bargaining unit, and that by reason of the coercive effect of such an order, the Bank will be compelled to bargain with the Union in violation of the property rights of appellants.

The statement in the affidavit that the Union has applied to the United States Conciliation Service to persuade the Bank to bargain with it is an allegation of an undisputed fact in the record of the case, and should be taken as true. Nor can there be any reasonable doubt of the correctness of the conclusions stated that unless said certification is declared null and void by the courts, the banks will ulti-

mately be compelled to bargain with the Union to the destruction of appellants' property rights.

The National War Labor Board has repeatedly held that it will compel recognition of bargaining units and bargaining representatives certified by the National Labor Relations Board, and has repeatedly ordered contracts to be made with representatives so certified so long as such certification remains in force.

In the case of *Allis-Chalmers Mfg. Co.*, 11 WLB 518, decided October 12, 1943, in holding the company, the union and the employees bound by the certification of the National Labor Relations Board, the War Labor Board said (p. 519):

"Executive Order 9017, dated Jan. 12, 1942, which created the War Labor Board, provided that 'nothing herein shall be construed as superseding or in conflict with the provisions of * * * the National Labor Relations Act.' The War Labor Disputes Act provides that in deciding disputes the War Labor Board 'shall conform to the provisions of * * * the National Labor Relations Act.'

By these requirements, the President and Congress have unmistakably directed the War Labor Board to take no action in conflict with the National Labor Relations Act. Under that Act the National Labor Relations Board has exclusive jurisdiction to determine appropriate collective bargaining units and to certify collective bargaining agencies, and no appeal to the Circuit Courts of Appeal can be taken." (Citing *AFL v. NLRB*, 308, U. S. 401.)

To the same effect are *Aluminum Company of America*, 12 WLB 446 (November 27, 1943); *Automatic Transportation Company*, 8 WLB 1 (April 14, 1943); *Pacific Gas & Electric Co.*, 4 WLB 68, (October 16, 1942); *Shell Oil Co. Inc.*, 3 WLB 297, (September 23, 1942).

It is manifest that unless the decision and certification of the Board are set aside by the courts, the appellants will be deprived of their aforesaid constitutional rights. As previously shown, Congress, in enacting the National Labor

Relations Act, made provision whereby any party aggrieved by the Board's action might have his day in court. Such a provision was necessary to the validity of the Act, at least insofar as the grievance may have resulted from an alleged exercise of power by the Board over matters not closely and substantially affecting commerce, and hence beyond its constitutional authority.

But the Union has taken steps which will undoubtedly result in a compulsory contract between the Bank and the Union, without appellants being afforded an opportunity to a judicial review under the National Labor Relations Act. When the certification was obtained, the Union abandoned the procedure prescribed by the Act, and took steps to bring about a compulsory contract between the Union and the Bank, thru the medium of the National War Labor Board, so that the appellants would be deprived of any opportunity of having a court determine whether they have been deprived of their rights under the Constitution. This a court of equity, on a proper application, should not tolerate.

VII.

The Court Has Jurisdiction to Consider and Pass Upon the Issues Raised in this Suit.

(a) The Court has Jurisdiction of the Defendants.

The defendants are the three members of the National Labor Relations Board. Their respective residences and official offices are in the District of Columbia.

The court below held that it had jurisdiction. This holding is in accord with *A. F. of L. v. Madden*, 33 F. Supp. 933.

(b) The Court has Jurisdiction of the Subject Matter.

The court below held that it had jurisdiction to grant the relief sought by the appellants, citing the decision of this Court in *A. F. of L. v. National Labor Relations Board*, 70 Appeals, D. C. 62, 103 F. 2d 933.

In that case the National Labor Relations Board had certified a certain CIO Union as the bargaining representative of all the Pacific coast longshoremen. The A. F. of L., in the capacity of a person "aggrieved" by the certification, petitioned this Court to review the Board's certification. This court held that the certification was not an "order" and hence not reviewable by it under the provisions of the National Labor Relations Act. It said, (p. 936):

"Accepting, as we must, this restrictive definition and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing, and though it was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation, it was not an order because the Act did not require it to be made in the language of command, *and hence is reviewable as was held in the Shields case, supra, and in Utah Fuel Co. v. National Bituminous Coal Commission, 50 S. Ct. 409, 83 L. Ed. —, decided Jan. 30, 1939—only in an independent suit in equity commenced in a District Court.*" (Emphasis ours)

The A. F. of L. thereupon instituted suit in the District Court of the District of Columbia to set aside the Board's certification. That court denied the Board's motion to dismiss for lack of jurisdiction. *AFL v. Madden*, 33 F. Supp. 943.

In accord with the foregoing are—

Klein v. Herrick, 41 F. Supp. 417-423 (Dist. Ct. S. D. N. Y.)

International Brotherhood, etc. v. National Labor Relations Board, 41 F. Supp. 57, 59 (Dist. Ct. Ed. E. D. Michigan S. D.)

Certainly the decision and certification of the Board in the instant case strikes at and will destroy, unless annulled and set aside, appellants' right to negotiate with their employer with respect to the rates of pay, wages, hours of employment and other conditions of employment, and the right

to select representatives for such negotiations, which are rights of property protected by the Constitution.

VIII.

The Court Erred in Denying Appellants' Motion for a Preliminary Injunction.

It is manifest that if the decision and certification of the Board is permitted to stand, there is great danger that appellants' rights will have been impaired and that they will have suffered great and irreparable injury before the final disposition of this action, through the Bank's voluntarily contracting or being compelled by an order of the National War Labor Board to contract with the Union pursuant to said certification. The court below should have granted appellants' motion for a preliminary injunction and directed the appellees to expunge said decision and direction of election and said supplemental decision and certification of representatives from the records of the Board pending the disposition of this suit.

It is respectfully submitted that this court should reverse the order of the court below granting the appellees' motion to dismiss the complaint, and denying appellants' motion for a preliminary injunction, and should direct the court below to hear the cause on a trial de novo, and to enter a preliminary injunction expunging said decision and certification of representatives from the records of the Board pending the final disposition of the cause.

Respectfully submitted,

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NICHOLAS J. CHASE,
821 15th St., N. W.,
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Attorneys for Appellants.

R. A. BULLINGER,
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Of Counsel.

APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8657

LYLE E. REILLY, ET AL., *Appellants*

v.

HARRY A. MILLIS, ET AL., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

JOINT APPENDIX.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED.**

1 *Complaint for Mandatory Injunction
to Expunge Certification.*

Plaintiffs, Lyle E. Reilly, George A. Freibert, Fred J. Bauer, Arthur H. Meyer, Emil Dunger, Thomas J. Geary, Fingal Gustafson, Hughes F. Heighen, Harry J. Schulte,

2 Jerrell D. Brown, Alfred W. Sehlke, Frank Ross, Joseph Havel, Ernest E. Johnson, Frank A. Barr, James Dinley, W. H. Krause, Clarence A. Cornelius Norman D. Renn and John J. Bomicine severally complain of Harry A. Millis, individually and as Chairman of the National Labor Relations Board, Gerard D. Reilly, individually and as a member of the National Labor Relations Board, and John M. Houston, individually and as a member of the National Labor Relations Board, and respectfully state to the Court:

1. Plaintiffs, Lyle E. Reilly, George A. Freibert, Fred J. Bauer, Arthur H. Meyer, Emil Dunger, Thomas J. Geary, Fingal Gustafson, Hughes F. Meighen, Harry J. Schulte, Jerrell D. Brown, Alfred W. Sehlke, Frank Ross, Joseph Havel, Ernest E. Johnson, Frank A. Barr James Dinley, W. H. Krause, Clarence A. Cornelius, Norman D. Renn and John J. Bomicine are residents and citizens of the State of Illinois.

2. Defendant Harry A. Millis is a resident and citizen of the United States and of the District of Columbia and is and at all times herein mentioned has been Chairman of the National Labor Relations Board, appointed as such by the President of the United States pursuant to the terms and provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C. A., secs. 151-166).

3. Defendant Gerard D. Reilly is a resident and citizen of the United States and of the District of Columbia and is and at all times herein mentioned has been a member of the National Labor Relations Board, appointed as such by the President of the United States pursuant to the terms and provisions of the National Labor Relations Act.

4. Defendant John M. Houston is a resident and citizen of the United States and of the District of Columbia and since March 5, 1943, has been a member of the Na-
3 tional Labor Relations Board, appointed as such by the President of the United States pursuant to the terms and provisions of the National Labor Relations Act.

5. Defendants constitute the National Labor Relations

Board, herein called the "Board," created by the terms and provisions of Section 3 of the National Labor Relations Act, herein called the "Act," and as such are charged with the enforcement of said Act.

6. This is an action for equitable relief. Defendants are residents of the District of Columbia.

7. This action arises under the Constitution of the United States (Fifth Amendment) and under the laws of the United States (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C. A., secs. 151-166) as hereinafter more fully appears.

8. Plaintiffs are and at all times herein mentioned have been employed by City National Bank and Trust Company of Chicago, a national banking organization, hereinafter more fully described, as a part of its protection force.

9. City National Bank and Trust Company of Chicago (herein called the "Bank") is now and has been since October 5, 1932, a national banking organization chartered under the National Bank Act. It is engaged in commercial savings and loan activities, personal and corporate trust service, installment financing for automobile dealers, foreign banking, and investment services. The Bank is a member of the Federal Reserve System and of the Federal Deposit Insurance Corporation. The physical properties of the Bank are located at 208 South La Salle Street, Chicago, Illinois. The Bank is the forty-sixth largest commercial bank in the United States. As of December 31, 1942, the total assets amounted to \$232,258,453.56, and \$101,770,611.28 of such assets represented investments in securities of the United States Government. As of the same date,

loans and discounts outstanding were valued at
 4 \$54,531,147.94; deposits exceeded \$220,000,000; capital surplus and undivided profits amounted to \$8,314,024.93 and letters of credit and acceptances outstanding exceeded \$472,000. During the month of December 1942, transit items forwarded to banks outside the State of Illinois aggregated \$105,000,000. From July 1, 1942, to December 31, 1942, the Bank issued foreign letters of credit and travelers' checks valued at \$106,350, and also

provided foreign exchange for its customers during the same period of time valued at \$204,553. The Bank maintains deposit accounts in other banks located in fifteen principal cities in ten states throughout the United States. Prior to the war, the Bank maintained accounts in various other banks located in foreign cities. The Bank has approximately 600 employees.

10. City National Safe Deposit Company (herein called the "Safe Deposit Company") is now and has been since 1899 a corporation organized under and existing by virtue of the laws of the State of Illinois. It is engaged in the business of renting safety deposit space to the public. The physical properties of the Safe Deposit Company are located at 208 South La Salle Street, Chicago, Illinois. The Safe Deposit Company is a tenant of the Bank; the premises it occupies are within the physical confines of the Bank building; and it pays a monthly rental to the Bank for the use of its quarters. All of the stock of the Safe Deposit Company is owned by the Bank. Each of the officers of the Safe Deposit Company, with the exception of the manager, is also an officer of the Bank. Each member of the board of directors of the Safe Deposit Company is either a director or officer of the Bank. During the year 1942 the Safe Deposit Company received \$52,913 in rentals for safety deposit boxes. Additional income of the Safe Deposit Company during the same period of time amounted to \$1,631.76. As of January 31, 1943, the Safe Deposit Com-

pany had 8,227 safety deposit boxes under lease, of which 174 were leased to non-residents of Illinois.

Approximately one-half of the lessees of safety deposit space of the Safe Deposit Company are also customers of the Bank. The Safe Deposit Company has fifteen employees.

11. The protection force of the Bank consists of thirty-five armed guards who are divided into three groups,—police guards, messenger guards and night watchmen. The police guards are under the immediate supervision of the

chief of the day police of the Bank. Their duties consist of guarding the premises and directing customers seeking information. The messenger guards (sometimes referred to as deputies) are under the supervision of the manager of the mail and messenger division of the Bank. They are plain clothes men who accompany and protect messengers travelling from the Bank to other banks or business houses in the City of Chicago. The night watchmen protect the premises of the Bank at night, turn off lights and watch for fires. All of the Bank's protection force are under the immediate supervision of the chief of the day police of the Bank.

12. The Safe Deposit Company employs three armed guards and five vault attendants who are deputized to carry arms. They are all assigned to the area of the vault and their duties consist, respectively, of guarding the premises and of issuing, receiving and checking access slips from safe deposit box lessees who request admission to the vaults and withdrawing and replacing boxes for lessees. The vault attendants are under the immediate supervision of the manager of the Safe Deposit Company.

13. On March 26, 1943, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), a labor organization, herein called the "Union," filed with the Regional Director of the Board for the Thirteenth Region (Chicago, Illinois) a petition alleging that a ques-

tion affecting commerce had arisen concerning the representation of certain of the employees of the Bank and certain employees of Safe Deposit Company and requesting an investigation and certification of representatives pursuant to Section 9(c) of the Act. In filing the said petition the Union purported to represent over 70 per cent of the protection employees of the Bank and armed guards and vault attendants of the Safe Deposit Company. Said petition described the protection employees of the Bank and armed guards and vault attendants of the Safe Deposit Company as together constituting

an appropriate bargaining unit. Said petition of the Union related to approximately thirty-five employees of the Bank and eight employees of the Safe Deposit Company.

14. Said case became known and described on the docket of the Board as Case No. R-5319, In the Matter of City National Bank and Trust Company of Chicago and City National Safe Deposit Company, its wholly-owned subsidiary, and Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.).

15. On or about April 29, 1943, the Bank and the Safe Deposit Company filed their respective answers to the aforesaid petition of the Union and their respective motions to dismiss said petition. In each said answers and motions it was stated that the Board was without jurisdiction over the respondent and over the matters sought to be investigated and that the requested unit would not be appropriate. Thereafter, a hearing in said cause was held at Chicago, Illinois, before a trial examiner. The Bank and the Safe Deposit Company each appeared at said hearing by counsel and offered evidence in opposition to the petition for investigation and certification.

16. Upon the completion of said hearing the Board on June 15, 1943, made and entered its decision and direction of election in said cause, a copy of which decision
7 and direction of election is attached hereto marked Exhibit A and by this reference made a part hereof. As appears from said Exhibit A, the Board in said decision and direction of election overruled the aforesaid motions to dismiss and thereafter made the following findings:

“For the foregoing reasons, we are of the opinion that the Bank and the Safe Deposit Company may be considered as a single integrated enterprise, and we find that the Bank and the Safe Deposit Company are engaged in commerce and their operations affect commerce within the meaning of the National Labor Relations Act.”

“We find that all members of the day police, night force, and deputies employed by the Bank and the vault attendants employed by the Safe Deposit Company, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.”

And, after making said findings, the Board in said decision and directing of election directed as follows:

“Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with City National Bank and Trust Company of Chicago, and City National Safe Deposit Company, its wholly-owned subsidiary, Chicago, Illinois, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Thirteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union, affiliated with the American Federation of Labor, for the purposes of collective bargaining.”

17. Pursuant to said decision and direction of election defendants through their agent, said Regional Director, conducted an election on July 10, 1943, among

the employees of the Bank and of Safe Deposit Company involved in said proceeding and thereafter certified that there were forty-two eligible voters, that forty-four ballots were cast of which four were challenged, that of the unchallenged ballots twenty-three were cast for the Union and seventeen against the Union. Thereafter, objections were filed by the Bank and by the Safe Deposit Company to the conduct of the ballot and the election report. Both of said objections stated that the Board was without jurisdiction to order the election and that the unit in question was inappropriate. The said objections filed by the Bank alleged upon information and belief that less than a majority of its protection employees had voted in favor of being represented by the Union and that but for the inclusion in the unit of employees of Safe Deposit Company no majority in favor of the Union would have resulted at the election.

18. On July 19, 1943, said Regional Director issued his report on the objections recommending that all of said objections be overruled. Thereafter, on July 26, 1943, defendants Gerard D. Reilly and John N. Houston, acting as the National Labor Relations Board, issued a supplemental decision and certification of representatives, a copy of which is attached hereto marked Exhibit B and hereby made a part hereof. As more fully appears from said Exhibit B attached hereto the Board in and by said supplemental decision and certification of representatives overruled the aforesaid objections of the Bank and of the Safe Deposit Company and certified that the Union had been designated and selected by a majority of all members of the protection force employed by the Bank and of the vault attendants employed by the Safe Deposit Company (excluding managers, chiefs, assistant chiefs, supervisory and clerical employees and George A. Freibert) as their representative for the purposes of collective bargaining and that pursuant to Section 9 (a) of the Act the Union is the exclusive representative of all such employees for the purposes of collective bargaining with re-

spect to rates of pay, wages, hours of employment and other conditions of employment.

19. In said election conducted on July 10, 1943, thirty-five employees of the Bank's protection force voted. Fifteen of the ballots cast by said employees were in favor of the Union and twenty were against the Union. All of the plaintiffs voted at said election and cast their ballots against the Union. But for the inclusion in the Union of employees of the Safe Deposit Company a majority of the votes cast would have been against the Union. It was at the time of said election and still is the desire of a majority of the protection employees of the Bank that they not be represented by the Union for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

20. None of the plaintiffs was a party to said proceeding before the Board and none of them had notice of said proceeding or an opportunity to appear or be heard therein. Plaintiffs are advised by their counsel and therefore state that if they had sought to intervene in said proceeding their petition for intervention would have been denied. (Yates-American Machine Company, 10 N. L. R. B. 679, and Biles-Coleman Lumber Company, 4 N. L. R. B. 679.)

21. Plaintiffs severally have a right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment. Said right is a property right and is of great value. (Coppage v.

Kansas, 236 U. S. 1, 14.) Plaintiffs further have a
10 right to select representatives for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment and said right is also a property right and is of great value. (Texas & N. O. R. Co. v. Ry. Clerks, 287 U. S. 548, 571.)

22. The aforesaid decision and direction of election and supplemental decision and certification of representatives were and each is beyond the power of the Board and in contravention of the National Labor Relations Act of the

Constitution of the United States (Fifth Amendment) and is invalid, null and void in this that:

(a) Neither the Bank nor the Safety Deposit Company is engaged in commerce or in any activity affecting commerce but each is engaged in purely local and intrastate activity limited to the territorial confines of the City of Chicago. Neither corporation does any business in interstate commerce or beyond the geographical limits of the City of Chicago and no business of either corporation has any direct, immediate, close or substantial effect upon interstate commerce.

(b) The protection force of the Bank, including plaintiffs, are not engaged in commerce or in any activity affecting commerce. They are engaged solely in protecting the physical premises of the Bank of Chicago and the contents of said premises and the customers and employees making use of and going to and from said premises. No part of their activity extends beyond the confines of the City of Chicago or affects interstate commerce or any commerce in any direct, immediate, close or substantial manner. No question concerning the representation of said employees would or could occur in interstate commerce or burden or obstruct the same or the free flow thereof or lead or tend to lead to a labor dispute burdening or obstructing the same or the free flow thereof.

(c) The vault attendants of the Safe Deposit Company are not engaged in commerce or in any activity affecting commerce. Their activity is confined to the premises of the Safe Deposit Company in Chicago and they are engaged solely in protecting said premises and in making available to customers the deposit boxes maintained in the vault of the Safe Deposit Company in Chicago. No part of their activity extends beyond the confines of the City of Chicago or affects interstate commerce or any commerce in any direct, immediate, close or substantial manner. No question concerning the representation of said employees would or could occur in interstate commerce or burden or

obstruct the same or the free flow thereof or lead or tend to lead to a labor dispute burdening or obstructing the same or the free flow thereof.

23. The aforesaid decision and direction of election and supplemental decision and certification of representatives were and each is erroneous and invalid for the reasons set forth in paragraph 22 of this complaint and for the following additional reasons:

(a) The following findings of the Board are and each is unsupported by evidence and contrary to the evidence:

(1) "For the foregoing reasons, we are of the opinion that the Bank and the Safe Deposit Company may be considered as a single integrated enterprise, and we find that the Bank and the Safe Deposit Company are engaged in commerce and their operations affect commerce within the meaning of the National Labor Relations Act."

12 (2) "We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2(6) and (7) of the Act."

(3) "We find that all members of the day police, night force, and deputies employed by the Bank and the vault attendants employed by the Safe Deposit Company, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act."

(b) The decision of the Board that the employees of the Safe Deposit Company should be joined in a collective bargaining unit with protection employees of the Bank was and is arbitrary and capricious.

24. The effect of said decision and direction of election and said supplemental decision and certification of representatives, if they are not declared null and void or vacated and set aside, will be unlawfully to deprive plaintiffs and each of them of their aforesaid right to bargain with their employer with respect to rates of pay, wages, hours of em-

ployment and other conditions of employment and their aforesaid right to select representatives for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment. The value of said rights cannot be measured by any certain pecuniary standard and an action at law for damages resulting to plaintiffs because of the unlawful taking and destruction of said rights would be inappropriate and wholly inadequate.

25. The Act contains no provision by which plaintiffs may obtain a review of said decision and direction of election or said supplemental decision and certification of representatives, and plaintiffs have no way of preventing the aforesaid unlawful taking of said property rights or of obtaining redress therefor save in a court of equity.

13 26. By reason of the premises plaintiffs have no adequate remedy at law and are threatened with irreparable loss and damage and equity should therefore take jurisdiction to the end that plaintiffs' constitutional rights may be promptly, certainly and efficiently determined without injury, loss or damage to plaintiffs.

Wherefore plaintiffs pray:

(1) That process issue from this Honorable Court requiring the defendants and each of them to answer this complaint.

(2) That the aforesaid decision and direction of election issued on June 15, 1943, in the proceeding entitled on the docket of the Board as Case No. R-5319, In the Matter of City National Bank and Trust Company of Chicago and City National Safe Deposit Company, its wholly-owned subsidiary, and Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), and the supplemental decision and certification of representatives issued in said proceeding on July 26, 1943, be declared null and void and that a mandatory injunction be granted restraining and enjoining the defendants and each of them from permitting said decision and direction of election and said

supplemental decision and certification of representatives to remain upon the records of the Board and that defendants be directed and required to vacate and set aside said decision and direction of election and said supplemental decision and certification and to expunge the same from the records of the Board.

(3) That a preliminary injunction be granted restraining and enjoining the defendants and each of them during the pendency of this suit from permitting said decision and direction of election and said supplemental decision and certification of representatives to remain upon the records of said Board and directing and requiring defendants to vacate and set aside the same pendente lite.

(4) That a temporary restraining order be granted without notice restraining defendants and each of them pending hearing upon plaintiffs' application for a preliminary injunction from permitting said decision and direction of election and said supplemental decision and certification of representatives from remaining upon the records of said Board.

(5) That plaintiffs have such other, further and different relief as the Court shall deem proper in the premises.

Emil Dunger
 Arthur H. Meyer
 Thomas J. Geary
 George A. Freibert
 H. F. Meighen
 Albert W. Sehlke
 John J. Bomicine
 Ernest E. Johnson
 Fingal Gustafson
 Harry J. Schulte
 Frank Ross
 James Dinley
 Frank A. Barr

Jerrell D. Brown
Fred J. Bauer
William H. Krause
Clarence A. Cornelius
Norman D. Renn
Lyle E. Reilly
Joseph Havel

September 17, 1943.

ROBERT E. LYNCH
NICHOLAS J. CHASE
821 15th St. NW.
Washington, D. C.

R. A. BULLINGER
134 South La Salle Street
Chicago, Illinois
Attorneys for Plaintiffs.

15 State of Illinois, County of Cook, ss.

Lyle E. Reilly, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled cause; that he has knowledge of the facts; that he has read the foregoing complaint and knows the contents thereof, and that the same is true except as to allegations stated to be on information and belief and as to those he believes them to be true.

LYLE E. REILLY

Subscribed and sworn to before me this 4 day of September, 1943.

R. J. OLSEN
Notary Public

(Seal)

My Commission Expires Jan. 26, 1946.

Exhibit A

United States of America
 Before the National Labor Relations Board
 Case No. R-5319

In the Matter of CITY NATIONAL BANK AND TRUST COMPANY
 OF CHICAGO, AND CITY NATIONAL SAFE DEPOSIT COMPANY,
 its wholly-owned subsidiary

and

PROTECTIVE SERVICE EMPLOYEES' UNION OF CHICAGO, LOCAL
 240, affiliated with BUILDING SERVICE EMPLOYEES' IN-
 TERNATIONAL UNION (A. F. of L.)

Bell, Boyd & Marshall, by Mr. David A. Watts, of Chicago,
Ill., for the Bank and the Safe Deposit Company.

Messrs. Daniel D. Carmell and John Arnett, of Chicago, Ill.,
for the Union.

Mr. Robert Silagi, of counsel to the Board.

Decision and Direction of Election

Statement of the Case

Upon a petition and an amended petition duly filed by Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of City National Bank and Trust Company of Chicago, Chicago, Illinois, herein called the Bank and City National Safe Deposit Company, Chicago, Illinois, herein called the Safe Deposit Company, herein collectively called the Companies, the National Labor Relations Board provided for an appropriate hearing upon due notice before David Karasick, Trial Examiner. Said hearing was held at Chicago, Illinois, on May 10, 1943. The Bank, the Safe Deposit Company, and the Union appeared and participated. All parties were afforded

full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.¹

At the hearing the Bank and the Safe Deposit Company moved to dismiss the petition on the ground that the Board lacked jurisdiction. The Trial Examiner reserved ruling on this motion for the Board. For reasons appearing in Section I, *infra*, the motion is hereby denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. On May 22, 1943, the Bank, the Safe Deposit Company, and the Union filed briefs which the Board has considered.

17 Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Companies

The parties stipulated to the following facts concerning the business of the Companies:

City National Bank and Trust Company of Chicago is now and has been since October 5, 1932, a national banking organization chartered under the National Bank Act. It is engaged in commercial savings and loan activities, personal and corporate trust service, installment financing for automobile dealers, foreign banking, and investment services. The Bank is a member of the Federal Reserve System and of the Federal Deposit Insurance Corporation. The physical properties of the Bank are located at 208 South La-Salle Street, Chicago, Illinois.

The Bank is the 46th largest commercial bank in the United States. As of December 31, 1942, the total assets amounted to \$232,258,453.56, and \$101,770,611.28 of such assets represented investments in securities of the United States Government. As of the same date, loans and discounts outstanding were valued at \$54,531,147.94; deposits

¹ Following the hearing, the parties entered into a stipulation to correct certain errors in the transcript. Said stipulation is hereby approved and the stipulated corrections are hereby ordered to be made in the official transcript.

exceeded \$220,000,000; capital surplus and undivided profits amounted to \$8,314,024.93; and letters of credit and acceptances outstanding exceeded \$472,000.

During the month of December 1942, transit items forwarded to banks outside the State of Illinois aggregated \$105,000,000. From July 1, 1942, to December 31, 1942, the Bank issued foreign letters of credit and travelers' checks valued at \$106,350, and also provided foreign exchange for its customers during the same period of time valued at \$204,553.

The Bank maintains deposit accounts in other banks located in 15 principal cities in 10 States throughout the United States. Prior to the war, the Bank maintained accounts in various other banks located in foreign cities.

City National Safe Deposit Company is now and has been since 1899 a corporation organized under and existing by virtue of the laws of the State of Illinois. It is engaged in the business of renting safety deposit space to the public. The physical properties of the Safe Deposit Company are located at 208 South LaSalle Street, Chicago, Illinois. The Safe Deposit Company is a tenant of the Bank; the premises it occupies are within the physical confines of the Bank building; and it pays a monthly rental to the Bank for the use of its quarters.

All of the stock of the Safe Deposit Company is owned by the Bank. Each of the officers of the Safe Deposit Company, with the exception of the manager, is also an officer of the Bank. Each member of the board of directors of the Safe Deposit Company is either a director or officer of the Bank.

During the year 1942, the Safe Deposit Company received \$52,913 in rentals for safety deposit boxes. Additional income of the Safe Deposit Company during the same period of time amounted to \$1,631.76. As of January 31, 1943, the Safe Deposit Company had 8,227 safety deposit boxes under lease, of which 174 were leased to non-residents of Illinois. Approximately one-half of the lessees of safety de-

posit space of the Safe Deposit Company are also customers of the Bank.

The Companies assert that they are not subject to the jurisdiction of the Board, contending that neither the Bank nor the Safe Deposit Company is engaged in interstate commerce. This contention is without merit.² The Bank

18 further argues that even if the Bank itself is found to be engaged in interstate commerce within the meaning of the Act, the Board does not have jurisdiction over its protection employees since they are not engaged in interstate commerce. This contention is also without merit.³ The contention of the "separability" of an employer's business has been foreclosed by the Supreme Court in *Virginia Electric & Power Company v. N. L. R. B.*, 314 U. S. 469, affirming in this respect the decision of the Fourth Circuit (115 F. (2d) 414). The lower court stated:

* * * unfair labor practices in any department of such a business will have repercussions in other departments; and strife affecting the interstate commerce in which the Company is engaged will be avoided only if the rights of all employees are properly safeguarded.

The Safe Deposit Company alleges that its operations in no way affect interstate commerce. We disagree with this allegation because of the following facts:

Mail directed to the Safe Deposit Company is received in part through the mailing division of the Bank and in part received directly. Outgoing mail of the Safe Deposit Company, however, is handled by the mailing division of the Bank exclusively. On the outside of the Bank building and within the Bank itself signs appear which show that the Bank holds itself out to the public as offering safe deposit services without in any way indicating that the services so

² See *N. L. R. B. v. Bank of America National Trust and Savings Association*, 130 F. (2d) 624, cert. den. U. S. , April 19, 1943, rehearing denied May 24, 1943.

³ See *Consolidated Edison Company*, 305 U. S. 197, affirming as modified 95 F. (2d) 390; *Butler Brothers v. N. L. R. B.*, F. (2d) (C. C. A. 7); *Southern Colorado Power Company v. N. L. R. B.*, 111 F. (2d) 539.

offered are operated by an independent company. The Safe Deposit Company does no advertising, yet it had envelopes for war bonds printed which bear only the name of the Bank and contain the following statement: "We recommend the excellent facilities of our safe deposit vaults." Although the Bank contends that the Safe Deposit Company is a separate and distinct enterprise, it appears that an assistant vice president of the Bank sent letters to prospective customers soliciting business for "our safe deposit vaults" stating that "We should like to number you among the customers of this department of our Bank" Keys to unrented safe deposit boxes are kept in a dual control safe, the combinations to which are held by the auditor of the Bank and the manager of the Safe Deposit Company. The manager of the Safe Deposit Company from time to time requests from the auditor of the Bank the release of such a number of keys as he anticipates will be needed within the immediate future. When articles are lost in the Safe Deposit Company, duplicate records are kept by the Safe Deposit Company and by the auditor of the Bank. The articles are placed in a dual control safe such as is used for keys mentioned above.

The Union introduced into evidence numerous articles taken from banking magazines, including the official publication of the American Bankers Association, purporting to show that the banking profession and the public generally regard safe deposit facilities as customary services which are offered by banks, and constitute a part of their usual operations.

From all the evidence and because of the corporate interrelationship, it is clear that the operations of the Safe Deposit Company are so closely integrated with those of the Bank that the two institutions in reality constitute a single business enterprise which falls within the purview of the Act. That the safe deposit business is regarded as a normal and customary incident of a banking enterprise has been fully recognized by the Supreme Court in *Colorado*

National Bank v. Bedford, 310 U. S. 41. Moreover, the National Bank Act itself recognizes that the safe deposit business is an integral part of the functions of national banks.

Thus, that statute restricts loans or purchases to or
 19 from affiliates of national banks but expressly exempts from the definition of "affiliates" any "affiliate . . . engaged solely in conducting a safe deposit business."⁴

For the foregoing reasons, we are of the opinion that the Bank and the Safe Deposit Company may be considered as a single integrated enterprise, and we find that the Bank and the Safe Deposit Company are engaged in commerce and their operations affect commerce within the meaning of the National Labor Relations Act.

II. The organization involved

Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Bank and the Safe Deposit Company.

III. The question concerning representation

The Companies have refused to grant recognition to the Union as the exclusive bargaining representative of the employees petitioned for until the Union has been certified by the Board in an appropriate unit.

A statement of the Regional Director, introduced into evidence at the hearing, indicates that the Union represents a substantial number of employees in the unit hereinafter found appropriate.⁵

⁴ 12 U. S. C. A., Section 371-C., 24. The Congressional Reports indicate that the safe deposit business is considered an adjunct of banking; see H. Rep. No. 83, 69th Cong., 1st Sess., p. 4.

⁵ The Regional Director reported that the Union submitted 22 application-for-membership cards, all of which bore apparently genuine original signatures; that the names of 14 persons appearing on the cards were listed on the Bank's pay roll of April 30, 1943, which contained the names of 35 employees in the appropriate unit; and that the cards were dated as follows: 13 between July and November 1942, and one undated.

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit

The Union seeks a single unit comprised of the day police, night force, and deputies of the Bank, together with the vault attendants of the Safe Deposit Company, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees. The Companies contend, as hereinbefore mentioned, that no unit is appropriate. However, they further contend that if the Board assumes jurisdiction, separate units confined to the employees of each employer should be established.

In support of their argument for separate units, the Bank and the Safe Deposit Company contend that they are separate and distinct corporations whose operations are not interrelated. They point out that the policies of the Safe Deposit Company are determined by its own board of directors which delegates authority to carry out such policies to the manager of the Safe Deposit Company. They state that the Safe Deposit Company maintains its own bank account, books and records, and that it makes its own report with respect to capital stock and tax returns. They maintain that the employees of the Bank and those of the Safe Deposit Company are not interchanged and have separate lockers and washrooms.

20 The record shows that the day police, night force, and deputies who are employed by the Bank are armed. The police guards and deputies are under the immediate supervision of the chief of the day police of the Bank, while the deputies are under the supervision of the

Eight of the 22 cards submitted bore the names of persons employed by the Safe Deposit Company. The names on the cards corresponded with the Safe Deposit Company's pay roll of April 30, 1943, which contained the names of 8 employees in the appropriate unit. The cards were dated between June and September 1942.

manager of the Mail and Messenger Division of the Bank. The police guards are assigned to different posts from week to week and their duties generally are to direct customers seeking information and to guard the premises. Their hours of work are irregular. The deputies are plain-clothes men who safeguard messengers going to other banks and business houses. They work uniform hours. The night watchmen protect the premises of the Bank at night, turn off lights, watch for fires, and make rounds, punching clocks. Their hours of work are regular.

The vault attendants, employed by the Safe Deposit Company, have regular hours and are assigned to posts of duty within the area of the vaults. In addition to guarding the premises, they perform semi-clerical tasks such as receiving and checking access slips from safe deposit box lessees who request admission to the vaults, and withdrawing and replacing the boxes for the lessees. Like the protection employees of the Bank, the vault attendants are armed or have immediate access to arms.

To demonstrate the appropriateness of a single unit, the Union adduced the following facts:

The protection employees of both companies are eligible for union membership. After the Safe Deposit Company closes at 4 p. m., a night watchman of the Bank patrols the premises of the Safe Deposit Company. This is done each day with the exception of Saturday and Sunday when the regular vault attendants are on duty. All categories of protection employees of both companies are paid monthly salaries ranging from \$135 to \$180 a month. The same type of pay check, on which there is no mention of the Safe Deposit Company, is used for the employees of both companies. The Bank alleges that this is done merely as a matter of convenience to the Safe Deposit Company. Group insurance policies covering employees of the Bank and the Safe Deposit Company are identical in form and in each instance state that the particular individual is an employee of the "City National Bank and Trust Company of Chi-

cago." Although the manager of the Safe Deposit Company hires personnel for that company, all persons to be employed must first file their applications with the personnel manager of the Bank. A vice president of the Bank who is likewise treasurer of the Safe Deposit Company testified that employees of the Safe Deposit Company are permitted to obtain loans through an employees' loan fund operated by the Bank. In general, it was admitted that the employees of both companies are treated alike.

For all these reasons and since we have already found, in Section I, *supra*, that the Companies constitute, in effect, a single employer, we see no reason why more than one unit should be established.⁶

George A. Freibert: The Union contends that Freibert is the acting assistant chief of the day police and should therefore be excluded from the unit. The Bank denies this. The former assistant chief had authority to assign starting times and posts of duty to other members on the force. In the absence of the chief, he assumed full authority. According to the Bank Freibert does not have such authority since, in the absence of the chief, the head of the maintenance division of the Bank is in charge. However, Freibert transmits orders of the chief to other members of the force and sometimes patrols a post of duty which was formerly occupied by the assistant chief. It is apparent that Freibert is regarded by the members of the force as the acting assistant chief. We shall therefore exclude him from the unit.

21 We find that all members of the day police, night force, and deputies employed by the Bank and the vault attendants employed by the Safe Deposit Company, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, consti-

⁶ See *N. L. R. B. v. Lund*, 103 F. (2d) 815 (C. C. A. 8); *Matter of Art Crayon Company, Inc.*, and its affiliated company, *American Artists Color Works, Inc.*, 7 N. L. R. B. 102; *Matter of Chrysler Detroit Company*, and *Chrysler Corporation*, 38 N. L. R. B. 313.

tute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9 (b) of the Act.

V. The determination of representatives

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby.

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with City National Bank and Trust Company of Chicago, and City National Safe Deposit Company, its wholly-owned subsidiary, Chicago, Illinois, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Thirteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause, to determine whether or not they desire to be repre-

sented by Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union, affiliated with the American Federation of Labor, for the purposes of collective bargaining.

Singed at Washington, D. C., this 15th day of June, 1943.

HARRY A. MILLIS

Chairman

GERARD D. REILLY

Member

JOHN M. HOUSTON

Member

(Seal)

NATIONAL LABOR RELATIONS
BOARD

22

Exhibit B

United States of America

Before the National Labor Relations Board

Case. No. R-5319

In the Matter of CITY NATIONAL BANK AND TRUST COMPANY
OF CHICAGO AND CITY NATIONAL SAFE DEPOSIT COMPANY,
its wholly-owned subsidiary

and

PROTECTIVE SERVICE EMPLOYEES' UNION OF CHICAGO, LOCAL
240, affiliated with BUILDING SERVICE EMPLOYEES' IN-
TERNATIONAL UNION (A. F. of L.)

Supplemental Decision and Certificates of Representatives

On June 15, 1943, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election in the above-entitled proceeding.¹ Pursuant to the Direction of Election, an election by secret ballot was conducted on July 10, 1943, under the direction and super-

¹ 50 N. L. R. B., No. 80.

vision of the Regional Director for the Thirteenth Region (Chicago, Illinois). On July 12, 1943, the Regional Director, acting pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, issued a Report on Ordered Election, copies of which were served upon the parties.

As to the balloting and its results, the Regional Director reported as follows:

Approximate number of eligible voters	42
Total ballots cast	44
Total ballots challenged	4
Total void ballots	0
Total valid votes counted	40

Votes cast for Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.)	23
Votes cast against the Union	17

On July 15, 1943, City National Bank and Trust Company of Chicago, herein called the Bank; and City National Safe Deposit Company, herein called the Safe Deposit Company, filed Objections to the Conduct of the Ballot and the Election Report, and on July 19, 1943, the Regional Director issued a report on those objections and duly served upon the parties copies thereof.

The Bank and the Safe Deposit Company contend that the Board has no jurisdiction over either of them, and further, that the bargaining unit found appropriate, is actually composed of two units improperly and erroneously joined. The Bank also contends that the agent of the Board conducting the election erred in that he failed to open and count the challenged ballots, and that the Election Report failed to include a ruling upon said challenged ballots with the findings and recommendations with respect thereto.

At the hearing in this matter and in their briefs, the Bank and the Safe Deposit Company were given full opportunity

to present their views to the Board with respect to jurisdiction and appropriate unit. In our Decision we gave careful consideration to these problems and our findings cannot properly be attacked in objections to the Report on Ordered Election. As to the latter two objections by the Bank, it is apparent that the opening and counting of the challenged ballots cannot, under any circumstance, dispel the majority of votes cast for the Union and thus affect the results of the election. Under those circumstances, no useful purpose would be served by investigating the challenged ballots. We therefore find that the objections of both the Bank and the Safe Deposit Company have no merit and they are hereby overruled.

Certification of Representatives

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

IT IS HEREBY CERTIFIED that, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), has been designated and selected by a majority of all members of the day police, night force, and deputies employed by City National Bank and Trust Company of Chicago, Chicago, Illinois, and the vault attendants employed by the City National Safe Deposit Company, Chicago, Illinois, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, as their representative for the purposes of collective bargaining, and that pursuant to Section 9 (a) of the Act, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), is the exclusive representative of all such employees for the purposes of collective

bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 26th day of July 1943.

GERARD D. REILLY

Member

JOHN M. HOUSTON

Member

(Seal) NATIONAL LABOR RELATIONS BOARD

* * * * *

24 *Motion for Preliminary Injunction*

Now come Lyle E. Reilly, George A. Freibert, Fred J. Bauer, Arthur H. Meyer, Emil Dungen, Thomas J. Geary, Fingal Gustafson, Hughes F. Meighen, Harry J. Schulte, Jerrell D. Brown, Alfred W. Sehlke, Frank Ross, Joseph Havel, Ernest E. Johnson, Frank A. Barr, James Dinley, W. H. Krause, Clarence A. Cornelius, Norman D. Renn, and John J. Bomicino, plaintiffs in the above entitled cause, by their attorneys, and move this Court on the verified complaint filed herein and on the affidavit attached hereto for a preliminary injunction enjoining the defendants and each of them during the pendency of this suit and until the further order of the Court from permittig the decision and direction of election issued by the National Labor Relations Board on June 15, 1943, and the supplemental decision and certification of representatives issued by said Board on July 26, 1943, to remain upon the records of the
25 Board and requiring defendants to vacate and set aside the same pendente lite. In support of said motion plaintiffs state:

1. Said decision and direction of election and supplemental decision and certification of representatives were and are beyond the power of the Board and invalid, null and void for the following reasons:

(a) Neither City National Bank and Trust Company of Chicago nor City National Safe Deposit Company is engaged in commerce or in any activity affecting commerce.

(b) No question concerning the representation of the police guards, messenger guards and night watchmen of the Bank or the armed guards or vault attendants of the Safe Deposit Company would or could occur in interstate commerce or burden or obstruct the same or the free flow thereof or lead or tend to lead to a labor dispute burdening or obstructing the same or the free flow thereof.

2. The findings of the Board upon which the aforesaid decision and direction of election and supplemental decision and certification of representatives rest are not supported by evidence and are contrary to the undisputed evidence.

3. The decision of the Board that the armed guards and vault attendants of the Safe Deposit Company should be joined in a collective bargaining unit with the police guards, messenger guards and night watchmen of the Bank was and is arbitrary and capricious.

4. Plaintiffs have a right to negotiate with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and a right to select representatives for such negotiations. Said rights are property rights and are of great value although their value is not subject to pecuniary measurement.

5. If the aforesaid decisions and certification of
26 the Board are permitted to stand the effect thereof
will be to deprive plaintiffs of their aforesaid property rights.

6. The Union certified by the Board as exclusive bargaining representative for plaintiffs and the other employees in the unit found by the Board to be appropriate has requested the Bank and the Safe Deposit Company to bargain with it as the exclusive representative of the employees in said unit and said Union has appealed to the United States Conciliation Service to persuade the Bank and the Safe

Deposit Company to comply with said request but the Bank and the Safe Deposit Company have refused to comply. As a consequence of such refusal the dispute between the Union and plaintiffs' employer will be certified to the War Labor Board. Plaintiffs are advised by their attorneys and believe, and therefore state, that it is the policy of the War Labor Board to order an employer to bargain with a union certified by the National Labor Relations Board without regard to the validity of the certification until the same is set aside by a court of competent jurisdiction. Any and all bargaining between the Union and plaintiff's employer will be in contravention of the aforesaid rights of plaintiff and will cause great and irreparable injury to plaintiffs.

7. Plaintiffs have no remedy under the National Labor Relations Act.

8. Unless defendants are directed to expunge said decision and direction of election and said supplemental decision and certification of representatives from the records of the Board pending disposition of this action, 27 plaintiffs' rights will have been impaired and plaintiffs will have suffered great and irreparable injury before final disposition of this action.

R. E. LYNCH

N. J. CHASE

821 - 15th Street, N. W.

Washington, D. C.

R. A. BULLINGER

134 South LaSalle Street

Chicago, Illinois

Attorneys for Plaintiffs

Dated September 17, 1943.

28 STATE OF ILLINOIS,
 County of Cook, ss:

Lyle E. Reilly, being first duly sworn, deposes and says that he is one of the plaintiffs, and the agent in this behalf of the other plaintiffs, in the above-entitled cause. That he has knowledge of the facts; that he has read the foregoing motion and knows the contents thereof; and that the same is true, except as to the matters therein stated to be alleged on information and belief and, as to those, he believes it to be true.

LYLE E. REILLY

Subscribed and sworn to before me, a notary public in and for said county and state, this 13th day of September, 1943.

R. F. OLSEN
Notary Public

My Commission Expires Jan. 26, 1946.

* * * * * * * *

29 *Affidavit of Lyle E. Reilly in Support of Application
 for Temporary Restraining Order and Motion for
 Preliminary Injunction*

STATE OF ILLINOIS,
 County of Cook, ss:

Lyle E. Reilly, being first duly sworn, deposes and says:

1. Affiant is one of the plaintiffs in the above-entitled cause and makes this affidavit in support of the application of plaintiffs for a temporary restraining order and the motion of plaintiffs for a preliminary injunction.

2. Affiant is an employee of City National Bank and Trust Company of Chicago (herein called the "Bank"). He has been employed by the Bank for more than seven years last past as an armed day-police guard, stationed on the premises of the Bank at 208 South LaSalle Street, Chi-

cago, Illinois, and has been assigned the duties of guarding the premises and directing customers seeking information. The total protection force of the Bank consists of thirty-five armed guards, divided into three groups, namely, 19 day-police-guards, 9 messenger-guards, and 7 night-watchmen. They are all under the supervision of a superior, known as the chief of the day-police of the Bank.

3. A wholly-owned subsidiary of the Bank, known as City National Safe Deposit Company (herein called the "Safe Deposit Company") leases certain space from the Bank for the purpose of operating a safe-deposit-vault business.

Said space is in the basement of the bank building,
30 but is entirely separate from space used by the Bank.

The Safe Deposit Company employs three armed guards and five unarmed vault attendants who have access to and are deputized to carry arms. They are under the supervision of the manager of the Safe Deposit Company.

4. The guards and vault attendants of the Safe Deposit Company are wholly separate and distinct from the protection force of the tank. There is no exchange of employees, no overlapping of duties, no centralized supervision, and no contact or opportunity for contact between the two groups of employees. From the standpoint of the employees, the two groups are as separate and distinct as if they were employees of two unaffiliated employers located in different cities.

5. Prior to 1943, the protection force of the Bank was not represented by and labor organization. Members of the protection force bargained separately with the Bank regarding rates of pay, wages, hours of employment, and other conditions of employment. In the fall of 1942, an organizer of Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union, A. F. of L. (herein called the "Union"), approached certain members of the Protection force of the Bank regarding representation by the Union. It was then the desire of affiant and of a majority of the protection em-

ployees of the Bank, including all of the plaintiffs to the above-entitled cause, that they not be represented by the Union. Affiant is informed and believes, and therefore states, that a similar approach was made to the three armed guards and five vault attendants of the Safe Deposit Company and that it was the wish of the majority of them that they be represented by the Union.

6. In order to force itself upon the protection employees of the Bank and to obtain authority to represent them, although a majority of them were opposed to such representation, the Union then conceived the idea of petitioning the National Labor Relations Board (herein called the "Board") to join the two independent groups of employees, namely, those of the Bank and those of the Safe Deposit Company, into one unit and to order an election therein. The Decision and Direction of Election issued by the Board on June 15, 1943, fostered this scheme of the Union by finding that the artificial and unnatural unit requested by the Union would be appropriate for purposes of collective bargaining and ordered a joint election among the protection force of the Bank and the three armed guards and five vault attendants of the Safe Deposit Company. At said election, twenty of the thirty-five employees of the Bank voted against the Union, but the minority of fifteen employees of the Bank, united with the eight employees of the Safe Deposit Company, gave the Union a slight majority of all employees in the combined unit.

7. On July 26, 1943, the Board issued its Supplemental Decision and Certification of Representatives in and by which the Board certified the Union as the exclusive representative of all the protection employees of the Bank, notwithstanding the fact that a majority of said employees did not then want and had never wanted to be represented by the Union. If said Supplemental Decision and Certification are permitted to stand and are observed by the Bank and the Union, the latter will have been successful in its scheme to deprive a majority of the protection employees of the

Bank of their right to negotiate with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and their right to select their own representative for such negotiations.

8. On July 30, 1943, the Union directed a formal communication to the Bank and the Safe Deposit Company requesting that a meeting be held between representatives of the Union and of the Bank and the Safe Deposit Company for the purpose of entering into a collective bargaining agreement respecting wages, hours, and conditions of employment for the employees in the artificial unit. The Bank formally replied to said request on August 9, 1943, as follows:

"We believe that the National Labor Relations Board was in error both in taking jurisdiction of your representation petition and in combining into one bargaining unit employees of this company and employees of the Safe Deposit Company. Moreover we are of the opinion that it would not be to the best interest of this company or its employees to bargain on that basis.

31 "We are therefore taking steps to secure a review of the Board's action and we trust you will understand our reasons for adopting this course."

9. Although said letter from the Bank to the Union stated that steps were being taken to secure a review of the Board's Action, no proceeding has been instituted by Bank for that purpose. Since the delivery of said letter of August 9, 1943, the Union has applied to the United States Conciliation Service to persuade the Bank to bargain with the Union. If the Bank accedes to the Union's demand, the plan of the Union to infringe upon the rights of the protection employees of the Bank will have been consummated and the property rights of affiant and the other plaintiffs thus destroyed. If the Bank does not accede to the Union's demand, but continues in its refusal to bargain with the Union, the dispute between the Union and the Bank will be certified to the National War Labor Board.

10. Affiant has been advised by his counsel and believes, and therefore states, that if the matter is presented to the National War Labor Board that body will, without examining into the validity of the certification by the National Labor Relations Board, order the Bank to recognize the Union and to bargain with it as the exclusive representative of all the protection employees of the Bank, provided the Supplemental Decision and Certification of the National Labor Relations Board are then still in effect. Affiant is further informed by his counsel and believes, and therefore states, that an order of the National War Labor Board is of such a coercive nature, both because of the support of public opinion which it has and because of the threat of application of sanctions by the President in the case of a violation, that the Bank will be compelled to and will obey it and bargain with the Union, in violation of property rights of affiant and the other plaintiffs to the above action.

11. Unless the decisions and certification of the National Labor Relations Board are forthwith set aside or expunged from the records of the Board, the aforesaid rights of affiant and the other plaintiffs to bargain with their employer and to select representatives for that purpose will thus be impaired and unlawfully taken from them.

LYLE E. REILLY

Subscribed and sworn to before me, a notary public in and for said County and State, this 13th day of September, 1943.

R. F. OLSEN,
Notary Public

My commission expires January 26, 1946.

* * * * *

32 *Affidavit in Support of Temporary Restraining Order and Preliminary Injunction.*

DISTRICT OF COLUMBIA, SS:

Robert E. Lynch, being first duly sworn, states that he has been advised that on September 14, 1943, the United States Conciliation Service of the Department of Labor certified the dispute between City National Bank, Chicago, Illinois, and the Protective Service Union affiliated with the Building Service Employees' International Union, A. F. of L., Local 240, to the War Labor Board and your affiant respectfully prays the court that the aforesaid reference be considered in conjunction with the allegations of paragraph six of the motion for preliminary injunction herein filed wherein it is averred that it is the policy of the War Labor Board to order an employer to bargain with a union certified by the National Labor Relations Board without regard to the question of absence or presence of power or jurisdiction in the National Labor Relations Board.

ROBERT E. LYNCH,
821 15th St., N. W.,
Washington, D. C.

Subscribed and sworn to before me, a Notary Public for the District of Columbia, this 17th day of September, 1943.

CHARLES E. STEWART,
Clerk.

By JOHN O. BOWEN,
Deputy Clerk.

* * * * *

33

Motion to Dismiss

Now come Harry A. Millis, Gerard D. Reilly, and John M. Houston, defendants herein, by their attorneys and move the Court to dismiss the Bill of Complaint herein and to deny plaintiff's application for an injunction upon the following grounds:

1. The United States District Court is without jurisdiction over the subject matter of the Bill of Complaint herein.

2. The Bill of Complaint fails to state a cause of action entitling the plaintiffs to any relief.

3. The complaint on its face shows that the plaintiffs are not threatened with or in danger of suffering any irreparable or immediate injury.

4. The complaint fails to show that the plaintiffs have exhausted their administrative remedy under the National Labor Relations Act and affirmatively shows that the plaintiffs have failed to invoke such administrative remedy.

5. The plaintiffs have a complete and adequate remedy under the National Labor Relations Act.

6. It appears from the face of the complaint that the complaint fails to join indispensable parties to the suit, namely, City National Bank and Trust Company of Chicago and City National Safe Deposit Company and Protective Service Employees Union of Chicago, Local 240, affiliated with Building Service Employees International Union, A.

34 F. L.

7. The complaint on its face fails to show that the certification issued by the National Labor Relations Board was arbitrary or capricious or so plainly illegal or erroneous as to warrant exercise of the extraordinary power to issue a mandatory injunction.

Wherefore, the defendants respectfully move this Honorable Court to dismiss the complaint in this action.

ROBERT B. WATTS

General Counsel

MALCOLM F. HALLIDAY

Assistant General Counsel

ALBERT P. WHEATLEY

WM. A. BABCOCK, JR.

Attorneys for Defendants.

Address: National Labor Relations,
Board, Washington, D. C.

Service of the within Motion to Dismiss and Defendants' Memorandum of Points and Authorities by receipt of copies thereof is hereby acknowledged this 23rd day of September, 1943.

R. E. LYNCH

Attorney for Plaintiffs

35

Answer to Motion to Dismiss

Come now plaintiffs, by their attorneys, and by way of answer to the Motion to Dismiss herein filed, aver as follows:

Plaintiffs respectfully refer this Honorable Court to the allegations of the Bill of Complaint, the Motion for Preliminary Injunction and the Points and Authorities thereto appended. It will be seen that the bill of complaint asserts a cause of action and that, therefore, the instant motion to dismiss should be denied. The motion to dismiss is the only responsive pleading filed to the bill of complaint and to the motion for preliminary injunction. The instant hearing thus may be said to involve not only the cause of action asserted in the complaint but also the right to relief pending final hearing if this Court should determine that the motion to dismiss must be denied.

Counsel for plaintiffs propose to treat herein the various grounds asserted in the motion to dismiss. In the attached memorandum of points and authorities these grounds are treated seriatim. On the basis of the points and authorities hereto attached, and such other reasons as may be
 36 set up at the time of oral argument, plaintiffs respectfully pray that the motion to dismiss be denied, the motion for preliminary injunction granted and that this Honorable Court enter appropriate orders accordingly.

ROBERT E. LYNCH

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JOHN J. DONNELLY, JR.

R. A. BULLINGER

821 - 15th Street, N. W.,

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Attorneys for Plaintiffs.

Service of copies of the above Answer to Motion and Memorandum of Points and Authorities is hereby acknowledged this 29th day of September, 1943.

MALCOLM F HALLIDAY

37

Memorandum

Plaintiffs, residents of the State of Illinois, are protection force employees of the City National Bank and Trust Company of Chicago. Defendants are members of the National Labor Relations Board, appointed by the President of the United States, by and with the consent of the Senate, pursuant to authority of the National Labor Relations Act, 49 Stat. 449.

A petition having been filed requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, the Board directed an investigation and provided for an appropriate hearing. A hearing was held and thereafter the Board directed an election to be conducted, which was held on July 10, 1943. Objections were filed thereto which were overruled by the Board July 19, 1943 and on July 26, 1943 the Board certified the Protective Service Employees' Union as the exclusive representative of all protection-force employees of the Bank and the Safe Deposit Companies for purposes of collective bargaining.

Plaintiffs have asked the Court to issue a preliminary injunction enjoining defendants, pendente lite, from permitting the decision and direction of election issued by the Board June 15, 1943 and the supplemental decision and certification of representatives issued by the Board July 26, 1943 to remain on the records of the Board and requiring defendants to vacate and set same aside pendente lite.

Defendants have moved to dismiss, founding their
38 motion on seven (7) separate grounds.

The Act provides that an appeal may be had to Circuit Court of Appeals only after the making of a final

order by the Board (*American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401), but certification by the Board of the collective bargaining representative does not constitute a final order within the meaning of the Act. This Court, however, has jurisdiction to grant the relief sought by plaintiffs (*American Federation of Labor v. National Labor Relations Board*, 70 Appeals D. C. 62) providing an affirmative showing has been made that the Board has acted arbitrarily or capriciously in the ordering or conducting of the election. On the other hand Federal Courts have no power under the Act to determine what is the appropriate and lawfully selected collective bargaining unit for employees. *Fur Workers Union v. Fur Workers Union, Local 72*, 70 App. D. C. 1-22, affirmed 308 U. S. 522 (without opinion). Furthermore the Board has exclusive jurisdiction in determining which employees shall be taken into account in determining who shall be given the right to vote in an election for a collective bargaining representative. *International Machinists, etc. v. National Labor Relations Board*, 71 App. D. C. 175, affirmed 311 U. S. 72.

Plaintiffs contend that the Board acted arbitrarily or capriciously in grouping the Bank protection force employees with those of the Safe Deposit Company. The record discloses, however, that the Board had full and sufficient evidence to support its decision that the Bank and Safe Deposit Companies should be considered a single unit for the purposes of election, and no evidence has been adduced to support plaintiffs' contention that this action on the part of the Board was arbitrary or capricious. As to the question of whether or not the City National Bank & Trust Company of Chicago is engaged in "commerce" within the meaning of the Act, this Court feels that the Board had supporting evidence to sustain its decision in this regard. *National Labor Relations Board v. Bank of America, etc.*, 130 Fed. (2) 624, cert. denied April 19, 1943, 8th C. C. A.

39 For the above reasons the motion of plaintiffs for a preliminary injunction will be denied and motion of defendants to dismiss will be granted. Counsel will present appropriate orders.

EDWARD C. EICHER

Chief Justice.

* * * * *

40

Order

The above entitled cause having been presented upon a complaint praying for a mandatory injunction to enjoin defendants from permitting a decision and direction of election and a supplemental decision and certification to remain upon its records and to direct defendants to vacate and set aside and to expunge from its records said decision and direction of election and said supplemental decision and certification; and upon a motion for preliminary injunction praying for an order to enjoin defendants pendente lite from permitting said decision and direction of election and said supplemental decision and certification to remain upon its records and to require said defendants to vacate and set aside the same; and upon a motion to dismiss the complaint, and after hearing argument of counsel, and due consideration having been given, it is hereby

Ordered, That,

1. The motion for preliminary injunction be and hereby is denied.
2. The motion to dismiss be and hereby is granted.
3. The complaint for mandatory injunction be and hereby is dismissed with costs.

EDWARD C. EICHER

Chief Justice

Dated October 26th, 1943

* * * * *

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Notice of Appeal

Notice is hereby given this 22 day of November, 1943, that the plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 26 day of October, 1943 in favor of Defendants against said plaintiffs.

NICHOLAS J. CHASE

Attorney for Plaintiffs

821 - 15th St., N. W., D. C.

* * * * *

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Designation of Record on Appeal

Appellant designates the following as the record on appeal herein:

1. The Complaint with exhibits.
2. The Motion for Preliminary Injunction with exhibits.
3. The Motion to Dismiss.
4. The Answer to the Motion to Dismiss.
5. The Memorandum Opinion of Justice Eicher.
6. The Order of October 26, 1943.
7. The Notice of Appeal.
8. This Designation of Record.

ROBERT E. LYNCH.

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This certifies that service of the above was had by mailing copy thereof, postage prepaid, to Robert B. Watts, Attorney for Defendants, General Counsel, National Labor Relations Board, Washington, D. C., this 24th day of November 1943.

ROBERT E. LYNCH.

* * * * *

BRIEF FOR APPELLEES

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8657

LYLE E. REILLY, ET AL., APPELLANTS

v.

HARRY A. MILLIS, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8657

LYLE E. REILLY, ET AL., APPELLANTS

v.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, GERARD D. REILLY, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the District of Columbia entered October 26, 1943, denying appellant's motion for a preliminary injunction and for a permanent mandatory injunction and granting appellees' motion to dismiss (A. 41).¹

Appellants, plaintiffs below, are 20 protection force employees of City National Bank and Trust Company of Chicago, herein called the Bank (A. 3, 9-10). Appellees, defendants below, are members of the National Labor Relations Board, hereinafter called the Board, an agency of the United States

¹ The designation "A" refers to the appendix which is printed with appellants' brief.

Government, created by an Act of Congress, known as the National Labor Relations Act, hereinafter called the Act (A. 2-3).²

Prior to the filing of the complaint in the Court below, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), herein called the Union, filed a petition and amended petition on December 1, 1942, and March 26, 1943, respectively, pursuant to Section 9 (c) of the Act, alleging that a question affecting commerce had arisen concerning the representation of employees of the Bank and of its wholly owned subsidiary, City National Safe Deposit Company, herein called the Safe Deposit Company,³ and requesting the Board to investigate such controversy and certify the name or names of representatives designated or selected by such employees. Thereafter the Board instituted an investigation and, pursuant to its Decision and Direction of Election issued on June 15, 1943,⁴ conducted an election on July 10, 1943, within the unit found appropriate.⁵ On July 15, 1943, the Companies filed separate Objections to the Conduct of the Ballot, and on July 26, 1943, the Board issued a Supplemental Decision, overruling the objections and certifying the Union as exclusive representative of all day police, night force, deputies, and vault attendants employed by the Companies (A. 5-9, 15-28).

On September 17, 1943, appellants filed in the Court below a complaint for a mandatory injunction to set aside and expunge from the records of the Board the Direction of Election and certification, and a motion for a preliminary injunction and temporary restraining order enjoining appellees from permitting the certification to remain on the Board's records. The complaint alleged that (1) the Board was without jurisdiction over the Companies, and (2) the Board's de-

² C. 372. 49 Stat. 449; 29 U. S. C. A. 151, *et seq.* The relevant provisions of the Act are printed *infra* pp. 17-22.

³ The Bank and the Safe Deposit Company are herein collectively called the Companies.

⁴ 50 N. L. R. B. 516 (A. 15-25).

⁵ The election resulted in 23 votes for and 17 against the Union (A. 26).

termination of the appropriate unit was improper (A. 1-14, 28-36). Appellees moved to dismiss the complaint on the grounds that the District Court is without jurisdiction over the subject matter of the complaint; the complaint fails to state a cause of action entitling appellants to any relief, shows that appellants are not threatened with or in danger of suffering any great, irreparable or immediate injury, fails to show that appellants exhausted their remedy under the Act, and affirmatively shows that appellants failed to invoke such remedy; appellants have a complete and adequate remedy under the Act; there is an absence of indispensable parties to the suit, namely, the Companies and the Union; and the complaint fails to show that the certification was arbitrary or capricious or so plainly illegal or erroneous as to warrant the issuance of a mandatory injunction (A. 37).

After hearing, the Court below rendered its opinion on October 4, 1943, finding that it had jurisdiction to grant the relief sought, but holding that the motion for preliminary injunction should be denied and that appellees' motion to dismiss the complaint should be granted (A. 39-41). On October 26, 1943, an order was entered denying the motion for the injunction and granting the motion to dismiss (A. 41). On November 22, 1943, appellants filed their notice of appeal (A. 42).

STATEMENT OF POINTS

1. The District Court is without jurisdiction over the subject matter of the complaint.

2. The complaint failed to state a cause of action entitling appellants to any relief.

- a. The complaint on its face showed that appellants were not threatened with or in danger of suffering any great, irreparable, or immediate injury, or any injury cognizable in equity as a result of any action by appellees.

- b. Appellants have a full, adequate, and complete remedy for the matters complained of.

- c. The complaint failed to allege that the Board took or failed to take any action that would have justified the granting of a mandatory injunction.

SUMMARY OF ARGUMENT

The Act does not provide for a review of Board proceedings concerning the investigation and certification of collective bargaining representatives until such time as the Board enters a final order based in whole or in part upon facts certified in such proceeding. It is for Congress to determine how the rights which it creates shall be remedied. The intent of Congress, as expressed in the Act and in the reports and debates on the bill which became the Act, clearly indicates that there was to be no judicial review except as set forth above. The District Court is therefore without jurisdiction to grant the relief sought by the complaint.

The certification is not an order and does not injure or threaten to injure any rights of appellants.

If the Board should in the future enter an order based in whole or in part on the facts certified, any person aggrieved by such order has a full and adequate judicial review under the provisions of the Act.

A mandatory injunction is governed by the same principles as a writ of mandamus, and such relief will be granted only when the duty to act is clear and substantially ministerial. It will not be used to require repudiation of a decision reached in the exercise of judgment and discretion pursuant to valid authority. The allegations of the complaint fail to show grounds for such relief, and at most amount to a contention that appellees erred in the conclusions reached. This is not sufficient to grant such relief and, in addition, appellees did not err in the conclusion reached.

ARGUMENT

I

The District Court is without jurisdiction over the subject matter of the complaint

Congress vested in the Board exclusive jurisdiction to administer the Act, subject to review by this Court and the various United States Circuit Court of Appeals after the entry by the Board of a final order under Section 10 (c) of the Act. *Myers v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U. S. 41; *United*

Employees Ass'n. v. N. L. R. B., 96 F. (2d) 875 (C. C. A. 3). There may be no review of Board proceedings prior to the entry of a final order. *American Federation of Labor, et al. v. N. L. R. B.*, 308 U. S. 401. Proceedings for the investigation and certification of representatives pursuant to Section 9 (c) of the Act are subject to review only as prescribed in Section 9 (d) of the Act, which provides for court review of such proceedings only after the Board enters a final order pursuant to Section 10 (c) of the Act, based in whole or in part upon facts certified following an investigation under Section 9 (c). When the Board enters such an order, any person aggrieved thereby may obtain a court review under Section 10 (f) of the Act. See e. g. *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 151-152. Until then, no review is allowed. *American Federation of Labor, et al. v. N. L. R. B.*, *supra*: *N. L. R. B. v. I. B. E. W.*, 308 U. S. 413.⁶

Nor may the courts by injunction or other proceedings assume jurisdiction over a subject matter with respect to which Congress has denied them direct statutory review. It is for Congress to determine how the rights which it creates shall be enforced. *Tutun v. United States*, 270 U. S. 568, 576-577. Where, as here, a statute creates a right and provides a special remedy, that remedy is exclusive, and a party may not substitute other judicial relief therefor.⁷

⁶ It has long been settled that the United States District Courts are totally without jurisdiction to enjoin Board proceedings. *Myers v. Bethlehem Shipbuilding Corporation, Ltd.*, *supra*, at 48-49; *Newport News Shipbuilding & Dry Dock Company v. Schauffler*, 303 U. S. 54. As to Section 9 (c) cases, *Heller v. Lind*, 86 F. (2d) 862, 66 App. D. C. 306, cert. den. 300 U. S. 672; *Bradley Lumber Co. v. N. L. R. B.*, 84 F. (2d) 97 (C. C. A. 5), cert. den. 299 U. S. 559; *Dupont v. Boland*, 85 F. (2d) 12 (C. C. A. 2); *Clark, et al. v. Lindemann and Haverson Co., et al.*, 88 F. (2d) 59 (C. C. A. 7), cert. den. 300 U. S. 681, 301 U. S. 707; *Northrop Corp. v. Madden, et al.*, 30 F. Supp. 993; *Marshall Field & Co. v. Millis, et al.*, District Ct. D. C., 9 L. R. R. Man. 670.

⁷ *Scitchmen's Union of North America v. National Mediation Board*, 64 S. Ct. 95, 97; *United States v. Babcock*, 250 U. S. 328, 331, and cases cited therein; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 404; *Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019; *Local Draft Board No. 1 v. Connors*, 124 F. (2d) 388, 390 (C. C. A. 9), and cases cited therein; *Securities & Exchange Commission v. Andrews*, 88 F. (2d) 441, 442 (C. C. A. 2); *Sykes v. Jenny Wren Co.*, 78 F. (2d) 729, 732, 64 App. D. C. 379, certiorari denied, 296 U. S. 624; *Monocacy Broadcasting Co. v. Prall*, 90 F. (2d) 421, 424, 67 App. D. C. 176.

When Congress assigns to an administrative agency the determination of rights which it creates, its purpose would be frustrated if parties were free to avoid the tribunal thus selected by the legislature and go directly to the courts. Such conduct would not only circumvent the will of Congress to protect and insure the rights it creates, but would also produce the very delays which Congress, in enacting the National Labor Relations Act, expressly sought to avoid by omitting court review. See *infra*, pp. 7-8; Section 10 (i).

The Supreme Court has recently disposed of this question in *Switchmen's Union of North America v. National Mediation Board*, 64 S. Ct. 95, decided November 22, 1943, where the Court concluded that United States District Courts have no jurisdiction to review a certification of the National Mediation Board. In reaching this conclusion that Court held that where Congress has not expressly authorized judicial review of a procedure it has created by statute, "the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied" (p. 97). Applying these tests to certifications under the National Labor Relations Act, it is beyond doubt that the holding in the *Switchmen's* case is directly applicable. The intent of Congress to exclude certifications under Section 9 of the National Labor Relations Act from the jurisdiction of the Federal courts is even clearer than its intent with respect to certifications of the National Mediation Board as set forth in the *Switchmen's* case.

The Congressional history of the bill which became the National Labor Relations Act fully discloses the legislative intent to prevent judicial intervention in certification proceedings. The Senate Committee Report^{*} emphasizes that there is no right of court review prior to an election, and then continues:

An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees * * * but if subsequently the Board makes an order predicated

^{*} S. Rept. No. 573, 74th Cong., 1st Sess., p. 14.

upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal Courts in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

The reason for thus limiting judicial review is disclosed by the Senate Report in describing the experience of the predecessor National Labor Relations Board under Public Resolution 44,⁹ wherein Congress specifically provided for Court review of directions of elections:

Any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals. This break-down of the law is breeding the very evil which the law was designed to prevent (pp. 5-6).

Similarly, the House Committee Report¹⁰ emphasizes the congressional intent to omit judicial review of election proceedings under Section 9, except after a final order as described in Section 9 (d), and the reason for such omission, when it recites:

* * * the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and

⁹ 48 Stat. 1183.

¹⁰ H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23.

provides an *exclusive, complete, and adequate remedy* whenever an order of the Board made pursuant to Section 10 (c) is based on whole or in part upon facts certified following an election or other investigation pursuant to Section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and (c) (p. 23).¹¹ [Italics supplied.]

It is thus apparent that Congress expressly denied judicial review of Section 9 (c) proceedings except as provided in Section 9 (d) of the Act.

In the *Switchmen's* case, *supra*, the Supreme Court also considered the "type of problem involved," namely, the determination and certification of collective bargaining representatives, which is identical to the problem which confronted Congress when enacting Section 9 of the Act. An examination of the two Acts discloses that in connection with this problem "the Labor Board is given precisely the same authority under the Labor Act as is the Mediation Board under the Railway Labor Act." *New York Handkerchief Mfg. Co. v. N. L. R. B.*, 114 F.

¹¹ Congress' intent to limit court review is further clarified by the statement of Senator Walsh, Chairman of the Senate Committee, on the floor of the Senate (79 Cong. Rec. 7658) :

"Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?

"Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.

* * * * *

"Mr. COUZENS. Would the passage of the pending bill remove the appeals to the courts?

"Mr. WALSH. Yes; it would because it limits appeals. It provides for review in the courts *only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.*" [Italics supplied.]

(2d) 144, 148-149 (C. C. A. 7), cert. den. 311 U. S. 704. The *Switchmen's* case is therefore conclusive authority for the question here presented.¹²

Since Congress in creating the rights provided for in Section 9 (c) of the Act has vested the Board with jurisdiction, subject only to the limited review by this Court and the various United States Circuit Courts of Appeal, as prescribed by Section 9 (d), the Court below was totally without jurisdiction to entertain appellant's complaint, or to grant the relief sought.

II

The complaint failed to state a cause of action entitling appellants to any relief

A. The complaint on its face shows that appellants are not threatened with or in danger of suffering any great, irreparable, or immediate injury, or any injury cognizable in equity as a result of any action by appellees

Assuming, *arguendo*, that the Court below had jurisdiction of the subject matter of the complaint, the appellants would not be entitled to the relief sought. It is fundamental to the granting of equitable relief that the acts complained of cause or threaten to cause great, irreparable or immediate injury. *Spielman Motor Sales Co., Inc., v. Dodge*, 295 U. S. 89, 95-96; *Heller Bros. Co. v. Lind*, 86 F. (2d) 862, 863, 66 App. D. C. 306, cert. den. 300 U. S. 672.

Appellants alleged that the certification deprived them of their right to bargain individually with the Bank, and to select representatives of their own choosing. Appellants alleged injury misconceives the legal effect of the certification. Their error is, in substance, that they attribute to the certification the character of an order and allege as legal consequences of the certification injuries or threatened injuries which are non-existent or do not result from the certification.

¹² The Railway Labor Act, c. 347, 44 Stat. 577, as amended c. 691, 48 Stat. 1185, 45 U. S. C. A. 151, unlike the National Labor Relations Act, does not provide for judicial review of a certification at any time, and in addition, actually imposes a duty upon the employer to treat with the certified representatives of employees upon the receipt of the certification of the National Mediation Board. Section 2 Ninth; *Switchmen's* case, *supra*.

A certification is not an order and does not affect appellants adversely. Neither the appellants nor anyone else are ordered to do or refrain from doing anything, no rights are extended or abridged and no right or obligation is determined as a result of the certification. It is merely a finding of fact without coercive effect. Such findings of fact, when made by a governmental agency, are not immediately reviewable by the courts even though they may become the basis for further action by the governmental agency, Congress, or the legislature or an administrative body of a state, and they form no basis for relief under the general equity powers of the District Courts. *United States, et al. v. Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299.¹³

The courts have uniformly held that a certification is not an order. *United Employees Ass'n. v. N. L. R. B.*, *supra*, at 876 (C. C. A. 3); *I. B. E. W. v. N. L. R. B.*, 105 F. (2d) 598, 601 (C. C. A. 6), reversed on other grounds 308 U. S. 413; *A. F. L. v. N. L. R. B.*, 103 F. (2d) 933, 936, 70 App. D. C. 62, affirmed 308 U. S. 401; *Associated Press v. Herrick*, 13 F. Supp. 897, 900 (D. C. N. Y.); *S. Buchsbaum & Co. v. Beman*, 14 F. Supp. 444, 449 (D. C. Ill.). In the *United Employees* case, *supra*, the Court said (at p. 876):

Here the Union is merely certified as "the exclusive representative of all such employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment." This is not a final order. *It is in fact not an order at all, but simply the certification of a fact which may be entirely ignored and disregarded by the Association and the Company.* The Company may go on with impunity bargaining with the Association just as though no certification had been made. [Italics supplied.]

¹³ This case involved a finding of valuation by the Interstate Commerce Commission under a statute providing for court review only after the Commission had relied upon such finding in a future order fixing rates. See also *Pennsylvania R. R. Co. v. Railroad Labor Board*, 261 U. S. 72; *Shannahan v. United States*, 303 U. S. 596, 599; *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527-528; *Ex parte Williams*, 277 U. S. 267, 271-272.

Thus the certification does not, as appellants contend, prevent appellants from bargaining individually with their employer if they so desire. Individual bargaining may not, to be sure, limit collective bargaining where the duty to bargain collectively exists (*J. I. Case Co. v. N. L. R. B.*, — S. Ct. 14 L. R. R. 17, decided February 28, 1944), but the duty to bargain collectively results not from the certification, but from the command of the statute, and is in no wise contingent upon the existence of a certification (*N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), cert. den. 304 U. S. 576). Appellants' legally-enforcible right to select collective bargaining representatives arises solely by reason of the Act. Accordingly, it is subject to the procedure prescribed by Congress, *supra*, pp. 4-9.

Nor does a certification cause any injury cognizable in equity. *Associated Press v. Herrick*, *supra*; *S. Buchsbaum & Co. v. Beman*, *supra*. In the *Buchsbaum* case the Court said (at p. 449):

The decisions made by the Board under section 9 (a), 9 (b), and 9 (c) * * * are not threatened injury of the kind which equity will enjoin. *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 314 * * *.

For the foregoing reasons, we submit that the certification is not an order, and that it could not and has not had any legal effect upon the rights of appellants. Accordingly, appellants have not, by reason of the certification, suffered any injury and are not threatened with or in danger of suffering any great, irreparable or immediate injury.

B. Appellants have a full, adequate, and complete remedy for the matters complained of

The certification, as already shown, is not an order, and it merely serves an advisory function without legal effect until such time as the Board, pursuant to Section 10 (c) of the Act, enters an order requiring an employer to bargain collectively and relies in whole or in part on facts certified in the investigation which led to the certification. In any such case, the Board is required to issue a complaint, hold a hearing, make

findings of fact, and issue its order (Section 10 (b), (c)). Any person who is aggrieved by such an order may, pursuant to Section 10 (f) of the Act, petition the appropriate court to review and set aside the order of the Board. In such a case, as noted, *supra*, p. 5, the record of the investigation made pursuant to Section 9 (c) must be included in the transcript required to be filed with the court, and the court is empowered to review the entire record filed. Thus, the Act provides a complete and adequate remedy with full judicial review.

Until appellants have exhausted this full and adequate remedy they may not seek judicial intervention. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51, and cases cited therein; *Newport News Shipbuilding and Dry Dock Co. v. Schauffler*, *supra*; See also *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 385.¹⁴

In short, until such time as the Companies refuse to bargain with the Union and are ordered to do so by the Board, appellants have suffered no injury entitling them to equitable relief. At that time they have a full and adequate statutory remedy. Thus, even assuming, *arguendo*, that the Court below had jurisdiction over the subject matter of the complaint, the complaint on its face shows no irreparable damage which appellants have suffered, and further shows that even if they should ultimately suffer injury which would entitle them to relief their action is prematurely brought.¹⁵

¹⁴ Moreover, appellants made no attempt to intervene at the Board's hearing or to bring the matters now complained of to the attention of the Board at any time. Appellants contention that intervention would necessarily have been denied is erroneous. See e. g. *Evening News Association*, 42 N. L. R. B. 763.

¹⁵ Appellants contention that they are threatened with immediate injury in that the National War Labor Board, not a party hereto, may require the Companies to bargain with the Union since it has been certified by the National Labor Relations Board, is pure speculation and is a contention having no relation to appellees. Moreover, nothing in the War Labor Disputes Act (Act of June 25, 1943, Public Law No. 89, 78th Cong.), nor Section 7 of the Executive Order of January 12, 1942, under which the National War Labor Board functioned during the period in question (7 Federal Register 238) in any way added to, or subtracted from, the jurisdiction of the National Labor Relations Board.

C. The complaint failed to allege that the Board took, or failed to take, any action which would have justified the granting of a mandatory injunction

In addition to the foregoing, the complaint failed to allege facts warranting the issuance of a mandatory injunction.

A mandatory injunction against government officers; or agencies, is the equivalent, in equity, of a writ of mandamus at law and the same principles govern both proceedings. *Miguel v. McCarl*, 291 U. S. 442, 451-452; *Morrison v. Work*, 266 U. S. 481, 490; *Brunswick v. Elliott*, 103 F (2d) 746, 750-751, 70 App. D. C. 45. To warrant such relief the duty on the part of the government agency or officer to perform the acts sought to be compelled by the injunction must be "plainly defined and peremptory" (*U. S., ex. rel. Girard Co. v. Helvering*, 301 U. S. 540, 543); so plainly required by statute as to be merely "ministerial" (*Miguel v. McCarl*, 291 U. S. 442, 451); "clear and indisputable" (*United States v. Wilbur*, 283 U. S. 414, 420); or "so plainly prescribed as to be free from doubt and equivalent to a positive command" (*Wilbur v. United States*, 281 U. S. 206, 218-219).

As stated by this Court in *Brunswick v. Elliott*, *supra*, "A writ of injunction, like a writ of mandamus, cannot be used to establish a legal right. The duty to act or refrain from acting must be so clear as not to admit of reasonable doubt or controversy, in order to justify such judicial control or guidance of administrative action." A mandatory injunction will not be used to require repudiation of a decision reached in the exercise of judgment and discretion in pursuance to valid authority. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Wilbur v. United States*, *supra*, *Brunswick v. Elliott*, *supra*.

Appellants allege that appellees' action in (1) asserting jurisdiction over the Companies, and (2) finding appropriate a unit composed of employees of both Companies, was arbitrary and capricious. At most, appellants' allegations amount to a contention that the Board erred in the conclusions it reached on the issues presented to it in the proceedings leading up to the certification. If this were true although it is contrary to the fact, it still would not justify the relief sought. *Adams v. Nagle*, 303

U. S. 532, 542-543. Moreover, the Board's conclusions on these issues are so clearly proper that they would require affirmance in the event of ultimate Court review.

The Supreme Court has held that allegations that the Board had erroneously entertained jurisdiction over employers not engaged in interstate commerce did not justify the granting of injunctions. See *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, at pp. 48-50, and *Newport News Shipbuilding and Dry Dock Co. v. Schauffler*, *supra*, at p. 58. Moreover, the Board's jurisdiction over the Companies is clear. *N. L. R. B. v. Bank of America Ass'n*, 130 F. (2d) 624 (C. C. A. 9), cert. den., 318 U. S. 791. (See pars. 9 and 10 of the Complaint, A. 3-4.)¹⁶

The Board's determination of the appropriate unit is conclusive, even upon statutory review, unless plainly shown to be arbitrary or capricious. *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 152-154. This Court has held that the determination with respect to the appropriate unit which has been vested in the Board is peculiarly a matter of its administrative discretion. *International Ass'n of Machinists v. N. L. R. B.*, 110 F. (2d) 29, 34-35 (App. D. C.), *aff'd* 311 U. S. 72. The judgment of the Board in this matter is entitled "to almost complete finality" (*Marshall Field & Co. v. N. L. R. B.*, 135 F. (2) 391, 394 (C. C. A. 7) and cases cited therein).

Appellants' contention that the Board's unit determination is arbitrary and capricious because it is inconsistent with the determination of the appropriate unit in analogous cases is erroneous. The Board's determination of the appropriate unit depends on all the facts in each case. Multiple employer units have been found appropriate by the Board in over forty cases. See e. g. *N. L. R. B. v. Lund*, 103 F. (2d) 815, 818 (C. C. A. 8); *N. L. R. B. v. Clarksburg Publishing Co.*, 120 F. (2d) 976,

¹⁶ The motion to dismiss admits only the allegations of the complaint describing the Companies' operations and not the conclusion that the Companies are not engaged in interstate commerce as erroneously contended by appellants. *Newport News Shipbuilding and Dry Dock Co. v. Schauffler, et al.*, *supra*. Likewise the allegations that appellees' action was arbitrary and capricious are legal conclusions, *Silberschein v. United States*, 266 U. S. 221, 225.

980 (C. C. A. 4); *United Press Associations*, 3 N. L. R. B. 344, 347; *Art Crayon Co., Inc.*, 7 N. L. R. B. 102, 116; *Elliott Bay Lumber Co.*, 8 N. L. R. B. 753, 757; *Ken-Rad Tube & Lamp Corp.*, 42 N. L. R. B. 1235.

Plainly no showing has been made that the inclusion in the appropriate unit of the employees of the Bank's wholly owned subsidiary, whose operations the Board found to be "so closely integrated with those of the Bank that the two institutions in reality constitute a single business enterprise," was either arbitrary or capricious. Thus, the Court below properly held that the Complaint failed to allege facts which showed that the Board had acted arbitrarily or capriciously and therefore had failed to justify the granting of a mandatory injunction. The Board may not be required by a mandatory injunction to take or retract action except where its duty to do so is clear "beyond peradventure" (*U. S. ex. rel. Chicago Great Western R. Co., et al. v. I. C. C. et al.*, 294 U. S. 50, 63).

If, therefore, contrary to appellees' contention, the Court below had jurisdiction over the certification proceeding, it is plain that, applying the tests sets forth, *supra*, p. 13, it properly denied the relief sought. This would nonetheless be true even if the Board's decision had been in fact erroneous. *U. S. ex. rel. Chicago Great Western R. Co., supra*, at p. 61; *United States v. Interstate Commerce Commission*, 88 F. (2d) 780, 784, 66 App. D. C. 398, cert. den. 300 U. S. 684.¹⁷

CONCLUSION

It is therefore respectfully submitted that the District Court was without jurisdiction of the subject matter of the complaint; that appellants had not suffered, and were not threatened with any great, irreparable, or immediate injury, as a result of the certification by the Board; that appellants have a complete and adequate remedy under the Act; and that appellants

¹⁷ Further, if appellants contentions are correct as to the effect of appellees' action, the Court below would nevertheless have had to dismiss the Complaint because of the failure to join indispensable parties, namely the Companies and the Union. *Texas v. Interstate Commerce Commission* 258 U. S. 158, 163-164; *Ducker v. Butler*, 104 F. (2d) 236, 238-239, 70 App. D. C. 103.

failed to allege facts to warrant the granting of a mandatory injunction. The judgment of the district court should accordingly be affirmed.

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MARCH 1944.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A. 151, *et seq.*) are as follows:

SEC. 2. (2) The term "person" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for

the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member hereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) The Board shall have power to petition any circuit of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of

the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein

the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

REPLY BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8657

LYLE E. REILLY, ET AL., *Appellants,*

v.

HARRY A. MILLIS, ET AL., *Appellees.*

Appeal from the District Court of the United States for the
District of Columbia.

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED APR 23 1934

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8657.

LYLE E. REILLY, GEORGE A. FREIBERT, FRED J. BAUER, ARTHUR H. MEYER, EMIL DUNGER, THOMAS J. GEARY, FINGAL GUSTAFSON, HUGHES F. MEIGHEN, HARRY J. SCHULTE, JERRELL D. BROWN, ALFRED WILLIAM SEHLKE, FRANK ROSS, JOSEPH HAVEL, ERNEST E. JOHNSON, FRANK A. BARR, JAMES DINLEY, W. H. KRAUSE, CLARENCE A. CORNELIUS, NORMAN D. RENN, JOHN J. BOMICINA,
Appellants,

v.

HARRY A. MILLIS, individually and as Chairman of the
National Labor Relations Board,

GERARD D. REILLY, individually and as a member of
the National Labor Relations Board,

JOHN M. HUSTON, individually and as a member of
National Labor Relations Board, *Appellees.*

**Appeal from the District Court of the United States for the
District of Columbia.**

REPLY BRIEF FOR APPELLANTS.

SUMMARY OF ARGUMENT.

The National Labor Relations Act is constitutional only because it provides a method by which proceedings and

actions of the National Labor Relations Board may be the subject of judicial review by parties aggrieved before compliance with the Board's orders can be enforced by the proceedings prescribed by the Act. In instances where the provisions for judicial review prescribed by the Act have not been considered adequate to protect aggrieved parties, it has been held that the United States District Courts have an independent jurisdiction in equity to entertain a suit to protect such rights.

In the instant case, particularly in view of the fact that proceedings to enforce the compliance with the Board's certification have not been brought under the Act where an opportunity is afforded for a judicial review of the validity of the Board's action, but proceedings have been brought before the National War Labor Board to enforce such certification, in which proceedings judicial review cannot be had under the Act or any other statutory provisions, the only possible remedy open to appellants is by an independent suit in equity in a United States District Court.

The National Labor Relations Board acted beyond its jurisdiction in making the instant certification and its action is thus void. Congress has not attempted to prohibit and could not constitutionally prohibit a judicial review of the question of whether the National Labor Relations Board acted beyond its jurisdiction in making a certification.

The right of the appellants to negotiate with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and the right to select their own representative for such negotiations are property rights, not created by but existing independent of any act of Congress and protected by constitutional guaranties.

Those rights of appellants will be greatly impaired or destroyed unless this court will intervene to protect them.

It has been repeatedly held that where rights of property are invaded or threatened with injury through the illegal

action of Boards or officers, courts of equity will afford the necessary protection and control such illegal action by means of the injunctive process.

ARGUMENT.

In replying to the brief of appellees the order of their argument, will be followed.

I.

The court has jurisdiction over the subject matter of the complaint.

The argument of appellees on this point may be summarized as follows: By the National Labor Relations Act Congress vested in the National Labor Relations Board exclusive jurisdiction to administer the Act, subject to review by this court and the various United States Circuit Courts of Appeal after the entry by the Board of a final order. There is no provision in the Act for a review of Board proceedings prior to the entry of a final order by the Board. The decision and certification of the Board here attacked is not a final order and hence is not reviewable by this court. And "It is for Congress to determine how the rights which it creates shall be remedied," and hence the plaintiffs have no right to complain of the limitation placed by Congress on the right to review actions of the Board.

It is true that a certification of a bargaining agent by the Board is not an order and is not enforceable as such. In order to implement such a certification by a proceeding under the National Labor Relations Act it is necessary for an interested party to complain to the Board of a failure to bargain with the agent so certified, whereupon the Board enters an order directing bargaining with the agent. Such order is enforceable only by a proceeding in a United States Circuit Court of Appeals, in which proceedings the Court has authority to examine into the question of the

validity of the bargaining unit and of the certification of the bargaining agent, including, of course, the jurisdiction of the Board to make its decision and certification.

It is the preservation of this right of review in the courts before compliance with any action of the Board can be compelled that renders the National Labor Relations Act constitutional. This is demonstrated by the opinion of the court in *Myers v. Bethlehem Corporation*, 303 U. S. 41, the first case cited in appellees' brief. In holding that the grant to the Board and the Circuit Court of Appeals of exclusive power is constitutional the court said, p. 48 et seq.:

“* * * The grant of that exclusive power is constitutional, *because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board.*

* * *

“*The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court.*

* * *

“*It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign*

commerce is involved, *but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise, contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.* Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." (Emphasis ours)

Thus it is apparent that the National Labor Relations Act is constitutional only because, before any action of the Board can be enforced, a court review is provided for, which review covers all proceedings before the Board leading up to the entry of the order which it is sought to enforce. If the Board has acted beyond its jurisdiction, as for instance in attempting to control the relations between an employer and its employees where interstate commerce is not affected, that question is open to judicial review and there can be no enforcement of the Board's order if the court finds it has exceeded its jurisdiction.

It is obvious that there must be some method provided for a judicial review of the Board's actions before citizens can be compelled to conform to the Board's order. Otherwise the Board would be constituted the final judge of all questions before it, including questions of its own jurisdiction. If some method of judicial review is not provided, there would be nothing to prevent the Board from taking jurisdiction in any case which it saw fit, regardless of whether interstate commerce is in the least involved or affected. We would then have a Board, a creature of Congress, interfering in matters left by the constitution to the exclusive control of the states and overriding all division of power between the states and nation involved in our federal system.

Congress, of course, did not attempt to create a board endowed with such powers, as is evidenced by the provisions for judicial review provided in the act. An act of

Congress purporting to vest any such power in a board of its creation would, of course, be unconstitutional as is already shown by the opinion of the court in the above case and by the case of *Crowell v. Benson*, 285 U. S. 22, discussed at length on page 28, et seq. of appellants' original brief.

It is obvious that Congress has no more authority under the constitution to create a board and give that board exclusive right to determine the scope of its own jurisdiction than it has to enact a law that Congress itself shall be the sole judge of whether its own enactments are within the scope of its constitutional power. In either case it would be attempting to usurp the functions of the courts to which the constitution has confided the determination of constitutional questions.

In *Myers v. Bethlehem Corporation*, *supra*, the judicial review prescribed for in the act was adequate to protect the rights of parties then before the court and the court so held.

In the case of *American Federation of Labor v. N. L. R. B.*, 308 U. S. 401, the court held that the certification of a bargaining agent was not a final order and hence not reviewable by the procedure prescribed in the National Labor Relations Act. But it expressly left open the question whether the union there complaining might not obtain relief by an independent suit in equity brought in a United States District Court. As pointed out on pages 39 and 40 of appellants' original brief, this court clearly indicated in *A. F. of L. v. National Labor Relations Board*, 70 App. D. C. 62, 103 F. (2d) 993, that the union might be entitled to institute an independent suit in equity in a United States District Court in order to protect its rights, and three United States District Courts, since that decision by the Supreme Court, knowing that the Supreme Court had expressly left open the question, have decided that a complaining union had the right to maintain such suit. These decisions are, of course, upon the ground that the provisions for judicial review in the National Labor Relations

Act were not adequate to protect the rights of the complaining union, even where proceedings were being taken under that act. Appellees' brief does not discuss or even mention these cases, although they still stand as unimpeached authority.

The instant case, however, differs from any case where proceedings under the National Labor Relations Act are being taken or threatened to compel bargaining with a bargaining agent certified by the Board.

The union in the instant case, after having obtained a certification as bargaining agent from the National Labor Relations Board, abandoned any attempt to implement such certification through proceedings before that Board, in which the aggrieved parties, including the plaintiffs here involved, would have had an opportunity to obtain a judicial review of the validity of the Board's decision and certification, including the question of the jurisdiction of the Board to make the same. It seeks to implement the certification of the Board through an order of an independent Board to be enforced by the impositions of sanctions, in which proceedings there is no statutory provisions for a judicial review of the validity of such certification.

The entire proceedings before the National War Labor Board is nothing but a proceedings to enforce bargaining pursuant to the certification. As pointed out in appellants' original brief, pages 37-38, the National War Labor Board has repeatedly held it will not inquire into the validity of a certification by the National Labor Relations Board, but will order bargaining in conformity therewith. The proceedings for enforcement through the National War Labor Board is thus designed to side-step all possibility of judicial review and compel obedience to the certification by a method beyond the contemplation of Congress when it enacted the National Labor Relations Act and in which it presumably provided adequate means for a judicial review by parties aggrieved.

If Board A can make a certificate beyond its jurisdiction, Board B order compliance therewith and Administrative Agent C enforces compliance, and all judicial review is barred, then aggrieved citizens are deprived of all protection of their constitutional rights through the medium of the courts of the United States into whose keeping the constitution has confided the duty of affording such protection.

Above all, it should be noted that the rights which appellants claim are being infringed, are not rights created by Congress but inalienable rights of property whose protection is guaranteed by the constitution (see appellants' original brief, pages 34 and 35) and which cannot be lawfully interfered with or limited by Congress or any agent of its creation except pursuant to power clearly conferred by the constitution. These are the rights to bargain with their employer concerning the nature of and the terms and conditions of their employment as free men, whether individually or through representatives which they each may freely choose, without pressure or intimidation being applied either to them or their employer.

The authority of Congress to regulate and control such relations between the appellants and their employer is derived from its power to regulate commerce among the several states. If, as appellants contend, that commerce is not affected by the relations existing between them and their employer, Congress has no power to interfere therewith, either directly or through an agent of its creation. Furthermore, in the instant case even should it be found that Congress has the power to regulate the conditions of employment between appellants and their employer, it has no power to compel appellants to become members of a bargaining unit and have a bargaining representative in common with employees of the Safe Deposit Company, whose relation to its employer can in no way affect such commerce.

The appellants are not asking this court to protect any rights created in them by Congress. Yet the burden of the argument in appellees' brief is made upon that assump-

tion. If appellants were claiming a right to bargain not only for themselves, but for others who do not freely consent to being represented by them, then they might be relying upon and claiming under a right created by Congress. They are not relying upon any act of Congress as giving them the right to individually bargain for themselves or to freely select someone to represent them and only those of them who freely and fully join in the selection of such representative. Such rights exist independent of any act of Congress, are protected by the constitution, and appellants contend, cannot be circumscribed or limited by Congress or an administrative agency in the manner in which it is here sought to circumscribe and limit the same.

The court in *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 64 Sup. Ct. 95, was careful to point out that it was dealing with rights created by Congress. If Congress creates a right it may circumscribe or limit the means by which such right is to be enforced. Any limitation on or omission of the right to court review is in effect a limitation on the right so created. Parties who are the beneficiaries of rights so created cannot complain that something more should have been given. It is a privilege of the giver to determine the character and quality of the gift or to omit it in its entirety.

Appellees concede (brief page 6) that in the *Switchmen's Union* case the court was dealing with a right created by Congress. They fall in error in seeking to apply the decision in that case to the instant case where the court is not being asked to protect rights created by Congress, but rights existing independent of any action of Congress and protected by constitutional guarantees.

II.

The complaint states a cause of action entitling appellants to relief.

It is contended that the complaint on its face shows that appellants are not threatened with any injuries cognizable in a court of equity as a result of the actions of appellees, and that appellants have a complete remedy under the National Labor Relations Act for the matters complained of.

This argument ignores entirely the method adopted by the union to implement the certification of bargaining representative through the action of the National War Labor Board. The only mention of this matter in appellees' brief is a note on page 12 to the effect that appellants' contention that they are threatened with immediate injury through action of the National War Labor Board is pure speculation, and is a contention having no relation to appellees. In view of the fact that, as shown by the record in the case, and as pointed out on page 8 of appellants' original brief, the dispute has been referred to the National War Labor Board, and of the fact, as shown on pages 38 to 39 of said brief, the National War Labor Board has repeatedly held it will not inquire into the validity of a certification of a bargaining agent of the National Labor Relations Board, but will order a contract with a certified agent, there is no speculation about appellants' rights being greatly threatened as a result of such certification.

This court will take judicial notice of the attitude of the National War Labor Board toward the validity of a certification of a bargaining representative by the National Labor Relations Board. In 31 C. J. S., it is said (p. 602):

“Judicial notice will be taken of the public official acts, practice, and proceedings of public officers and bodies which are of general public interest, or which are matters of common knowledge.”

This court will take judicial notice of the fact that the National War Labor Board has repeatedly and invariably ruled that it has no jurisdiction to and will not inquire into the validity of a certification of a bargaining representative by the National Labor Relations Board, but will order contracts with such certified representative until such time as the certification has been set aside by a competent authority.

In addition to the cases cited in appellants' original brief, attention is called to the case of *Lebanon Steel Co.*, 2 War Lab. Rep. 283 (April 14, 1942) wherein the Board said (p. 285):

"The decisions of the National Labor Relations Board are recognized by this Board at whatever stage they may have reached. *For the purposes of the National War Labor Board they are assumed to be valid unless and until they are reversed by a superior authority.* This Board has, therefore, no occasion to hear any discussion of the merits or demerits of the findings or conclusions of the National Labor Relations Board in this case." (Emphasis ours)

In *Aluminum Co. of America*, 12 War Lab. Rep. 455 (November 25, 1943), that Board said:

"The National War Labor Board, in a very recent decision involving the Springfield works of the Allis-Chalmers Manufacturing Company District 50 of the United Mine Workers of America, decided that *it is required to follow and support all rulings of the National Labor Relations Board which were in full force and effect at the time.*"

"Until the National Labor Relations Board rules that another union is entitled to represent these employees, the National War Labor Board intends to recognize Local 609 as their collective bargaining agent." (Emphasis ours)

In view of the repeated action of the National War Labor Board in ordering bargaining with a representative certified by the National Labor Relations Board, and of its re-

peated disclaimer of any willingness or authority to inquire into the validity of such certifications, there is just about as much speculation involved in concluding what the National War Labor Board will do with respect to ordering a contract with the union in the instant case as there is in predicting whether the sun will rise tomorrow.

There can be no denial of the fact that a procedure has been worked out by which the National War Labor Board will implement a certification of bargaining representative by the National War Labor Board through orders commanding contracts which are enforceable by sanctions, which is designed to deprive aggrieved parties of all opportunity to judicially review the validity of the proceedings in any of its stages and in which constitutional rights are ignored. Under such circumstances it is idle to contend that the certification by the National War Labor Board does not threaten the rights of appellants or that the appellants have an adequate remedy under the National Labor Relations Act. Once the certification of a bargaining agent has been obtained, the National Labor Relations Board and the National Labor Relations Act have served their purpose; they are thereafter ignored. The National War Labor Board then becomes the acting party enforcing the certification by an order to bargain which is enforceable by sanctions. Thus the ball is deftly passed in a snappy triple play from Board A to Board B to Administrator C over the heads of the courts and of the confused and aggrieved citizen, in total disregard of constitutional rights.

It is significant that the only attempt of appellees to sustain their claim of jurisdiction to make the decision and certification here involved is the following sentence on page 14 of their brief: "Moreover the Board's jurisdiction over the companies is clear", followed by the citation of *NLRB v. Bank of America*, 130 Fed. (2d) 624. We must assume that appellees have no answer to the arguments on pages 15 to 25 of appellants' original brief.

Nor have appellees attempted to challenge appellants' point that appellants are entitled to a trial de novo on the question of the Board's jurisdiction. We believe there is no answer to that point. We know of no authority which holds to the contrary. The reasoning of the Supreme Court in *Crowell v. Benson*, *supra*, on that point admits of no successful contradiction.

III.

The complaint alleges facts which would justify the issuance of a preliminary injunction.

It is contended that the complaint fails to allege facts warranting the issuance of a mandatory injunction.

As pointed out on page 27 of appellants' original brief, the complaint alleges the facts concerning the activities of the Bank and of the Safe Deposit Company and the duties of their respective employees here involved and contains full and complete allegations to the effect that interstate commerce is not affected by their respective activities. It is further pointed out on page 25 of appellants' original brief that the complaint alleges that the various findings of the Board that the Bank and the Safe Deposit Company are engaged in interstate commerce and that a question affecting such commerce has arisen concerning representatives of the employees involved, are each and all unsupported by the evidence and contrary to the evidence. It was further demonstrated on pages 25 and 26 of appellants' original brief that the allegations that said findings are not supported by evidence are allegations of fact admitted by appellees' motion to dismiss. Appellees have not controverted this proposition in any part of their brief, so it should be considered as standing admitted. It thus is admitted that there is no evidence in the record before the Board to sustain its findings relative to interstate commerce being involved or affected. Manifestly, therefore, the Board had no jurisdiction to make the certification in question, a fact which stands admitted by the motion to dismiss.

Thus on the allegations of the complaint the appellants are threatened with the deprivation of valuable property rights through a certification by the Board which is invalid, null and void because wholly beyond the jurisdiction of the Board to make.

Obviously the cases cited on page 137, appellees' brief to the effect that an "injunction will not be used to require repudiation of a decision reached in the exercise of judgment and discretion in pursuance to valid authority," have no application to this case. Appellants are not contending that this court has the power to control the discretionary action of officers or Boards taken in the exercise and within the scope of discretionary powers conferred upon them.

The Supreme Court has many times held that a court of equity, at the suit of one whose rights of property are invaded or threatened with injury through the illegal action of officers or Boards, will afford the necessary protection and control such action through the means of the injunctive process, *Ickes v. Fox*, 300 U. S. 82, 95-96; *Philadelphia Co. v. Stimson*, 233 U. S. 605, 619; *Goltra v. Weeks*, 271 U. S. 536, 544; *Work v. Louisiana*, 269 U. S. 250, 254.

The court denied injunctions in *Myers v. Bethlehem Corporation*, 303 U. S. 41 and in *Newport News Shipbuilding and Drydock Co. v. Schauffler*, 303 U. S. 54 (referred to on page 14 of appellees' brief) because in those cases there was no reason to suppose that plaintiffs would not be afforded an adequate judicial review by the proceedings provided in the National Labor Relations Act. Those cases have no application here, where the review proceedings provided for in that act are not available to appellants.

Neither the union nor the employing corporations are indispensable parties. *Brotherhood of Railroad Trainmen v. National Mediation Board*, 66 App. D. C. 375, 88 Fed. (2d) 756; *A. F. of L. v. Madden*, 33 Fed. Supp. 943.

It is respectfully submitted that this court should reverse the order of the court below granting the appellees' motion to dismiss the complaint, and denying appellants' motion

for a preliminary injunction, and should direct the court below to hear the cause on a trial de novo of the issue of the Board's jurisdiction, and to enter a preliminary injunction expunging said decision and certification of representatives from the records of the Board pending the final disposition of the cause.

Respectfully submitted,

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